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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN SUPPORT OF PETITION FOR APPEAL

BERNARD B. BAILEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY,

Appellant

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

BRIEF IN SUPPORT OF PETITION FOR APPEAL

Reference to Decision Below

The final judgment of the Supreme Court of Appeals of Virginia (R. 41), was rendered without formal opinion, affirming a judgment of the Fairfax Circuit Court in condemnation proceedings. The final judgment in an equity suit was rendered with formal opinion in 182 Va. 70, 27 S. E. (2) 914, and petition for certiorari to review that judgment was denied (321 U. S. 799). The record in the latter case (No. 829, Oct. Term 1943) is a part of the record of the present petition for appeal by stipulation of the parties (R. 38, par. 5 of stipulation).

Jurisdiction of Supreme Court of the United States

A complete jurisdictional statement has heretofore been filed and printed, and by order on April 30, 1945, further consideration of the question of the jurisdiction of this Court was postponed to the hearing of the case on the merits, and the case was transferred to the summary docket (R. 53). Jurisdiction is based upon Sec. 237(a) of the Judicial Code as amended. Briefly, the Supreme Court of Appeals of Virginia, the highest Court of Virginia, has affirmed (1) the ruling of the Fairfax Circuit Court that Sections 1969 j (4), and 1969 j (6), Virginia Code 1940, are not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, (2) the ruling denying the claim for compensation for the use of the appellant's property for highway purposes prior to acquisition of title, and (3) the ruling denying the appellant's claim for interest on the damages awarded for injuries to the residue of the appellant's property from the highway construction. It is contended that this Court has jurisdiction under Sec. 237(a) of the Judicial Code, as amended, to review not only the ruling on the statute but also the rulings as to compensation for use and interest on the damages awarded.

Statement of the Case

This controversy was precipitated by the appellee's seizure of the appellant's real property for the purpose of constructing a highway.

Description of the appellant's property—The appellant's property in Fairfax County, Virginia, is improved in part by a grist mill and a restored residence of colonial type. In the summer of 1941, the mill and residence fronted on a state highway near a curve, the residence standing on a ridge with the mill below. In the rear of the mill and resi-

dence there was a meadow of approximately ten acres bounded by a stream and by a mill race, the latter running in a winding course at the foot of a steep hill on the property. The hill, from which could be seen the countryside for miles around, formed part of a tract sloping to the mill race, which was suitable for residential development with the meadow, mill, and water fall in the distance (R. 6, 7). The mill was operated by an overshot wheel which received its power from water flowing from the stream and through the race. It was essential that the mill race be kept free from obstructions in order to maintain a water flow of sufficient quantity to operate the mill wheel, and in order to prevent the water from flowing over and breaking the bank of the race during heavy rains (R. 22, 23, No. 829).

Appellee's plans for relocation of highway, and appellant's objections and requests—In September, 1941, the appellee adopted a plan for the relocation of the highway on a course behind the mill and residence. The plan called for the construction of the highway through the meadow, within 150 feet from the residence, on a fill to be approximately 1100 feet long with a maximum height of 23 feet, and thence through the mill race and adjacent hill, cutting a gorge in the hill to be 37 feet in maximum depth, 127 feet wide, and approximately 300 feet long. The plan called for the laying of cement pipes in the race under the new highway, running between 90 and 100 feet in a bend following the course of the race. (R. 24, No. 829; R. 7, 16, 17, 21, 22.) In September and October, 1941, the appellant presented to the appellee's representatives his objections to the plan on the ground that it would be exceedingly difficult, if not impossible, to keep the pipes free from obstructions; that during heavy rain storms it would be impossible to remove obstructions, and that consequently the water would rise in the race, cut through the race bank, and cause washouts which would arrest the

operation of the mill and would be exceedingly expensive and difficult to repair. The appellant pointed out to them that the injuries to the race would be recurring injuries, beyond the power of the appellant to prevent, and would cause a complete breakdown of the race and a permanent stoppage of the operation of the mill by water power. The appellant requested them to make a survey and to prepare a plat to show what might be done to avoid these injuries by lightening up the curvature of the existing highway in front of the mill and residence, or in the alternative to delay the construction of the highway until the appellant could file suit to test the appellee's authority to destroy or seriously impair the operation of the mill. These requests were refused (R. 25-28, No. 829).

Appellee's offer and warning—The appellant, declining to accept $2,000 offered by the appellee as compensation for the land to be taken and damages to the residue, was warned by the appellee's representative that if he continued to refuse to accept the offer made to him the consequences would be that the appellee, acting pursuant to law, would enter upon the property and construct the highway, and that under the law the appellant would have to wait until the completion of the highway, and 60 days thereafter, before he could obtain a settlement (R. 25, 26).

Appellee's notice, deposit, and entry—The appellant continued in his refusal to accept the appellee's offer, and on October 13, 1941, the appellee, acting under Sections 1969j(4) and 1969j(6) of the Virginia Code 1940, which is the statute assailed in this case, notified the appellant that a certificate of deposit of $1,500 had been filed in the office of the Clerk of the Circuit Court of Fairfax County so that construction of the highway could proceed according to plan, and on October 15, 1941, entered upon the property and proceeded with the construction of the highway as planned (R. 27, No. 829).

Appellant's equity suit—On October 21, 1941, the appellant filed suit against the appellee in the Fairfax Circuit Court alleging, *inter alia*, that the construction of the highway as planned would destroy or seriously impair the operation of the mill; that it was not necessary for the appellee to destroy the operation of the mill because an acceptable highway could be constructed on the existing course in front of the mill; that the appellee was not authorized to destroy unnecessarily the operation of the mill which was devoted to a public use; that already an immense quantity of earth had been dug out of the hill adjacent to the race and that if the construction should be continued at the rate it was proceeding a deep cut or gorge through the hill would be accomplished before the appellant would be able to have a hearing in court, which would cause irreparable damage; that the appellant was not financially able to furnish adequate bond for a temporary restraining order; that the statute upon which the appellee relied in taking the property is unconstitutional in that it authorizes the appellee to postpone the condemnation proceedings for an unreasonable length of time; and praying that the statute be declared unconstitutional, that appellee be enjoined from the unlawful construction of the highway, and that the land be restored to its former condition, and for general relief. The bill did not pray for an injunction against the filing of condemnation proceedings, and did not seek in any way whatsoever to prevent or delay the filing of condemnation proceedings (R. 21-29, No. 829). The appellee was at liberty to file condemnation proceedings at any time he chose to do so, but instead of filing condemnation proceedings the appellee filed a demurrer to the appellant's bill in equity. The demurrer was sustained by the Court, and final decree dismissing the bill was entered on November 25, 1942 (R. 30-32, No. 829).

Filing of condemnation proceedings by appellee while appeal was pending in appellant's equity suit—On February 18, 1943, petition for appeal was filed by the appellant in the Supreme Court of Appeals of Virginia to review the final judgment of the trial Court in the equity suit, and on March 5, 1943, the appeal was awarded (R. 1-21, No. 829). On June 17, 1943, the appellee filed in the Fairfax Circuit Court a petition in condemnation proceedings to acquire title to the appellant's land used as the right of way for the relocated highway, and to fix the compensation and damages, if any, to be paid to the appellant (R. 1, 2).

Appellee's application for appointment of commissioners in the condemnation proceedings, and postponement thereof until appeal in equity suit was decided—In July, 1943, appellee applied to the trial Court for the appointment of commissioners in the condemnation proceedings to view the land, as required by statute (Virginia Code 1940, Section 1969j(2)), which provides that upon the selection of the commissioners, the court or the judge in vacation "shall direct them, in the custody of the sheriff or one of his deputies * * * to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party being allowed to be present and none other, unless otherwise directed by the Court; and upon motion of either party, the judge shall accompany the commissioners upon their view of the land." The statute provides also that "upon completion of the view, the court or the judge in vacation, shall hear the testimony in open court on the issues joined." On the date of this application for the appointment of commissioners to view the land, the appellee had already completed the excavations and fills in the construction of the relocated highway exactly as planned, so that even if the commissioners had been appointed it would have been impossible for them to view the land in its original condition

(R. 7). On July 9, 1943, the appellant filed a plea alleging that the appellee had no authority to condemn the land "for the reasons particularly set forth in the petition filed * * * on the 21st day of October, 1941 * * *" in the equity suit (R. 2, 3). At the instance of the appellant, and by "consent of both sides," action in the condemnation proceedings was postponed pending a decision on the appeal in the equity suit (R. 36, 37, No. 829).

Appellee's second application for appointment of commissioners in condemnation proceedings, and appellant's application for postponement thereof until disposition of petition for certiorari in equity suit—On December 6, 1943, judgment was entered in the Supreme Court of Appeals, affirming the final decree of the trial Court in the equity suit. The Court upheld the appellee's power to destroy the operation of the mill, and denied the appellant the right to attack the statute under which the property was seized (R. 33-37, No. 829). On January 25, 1944, petition for rehearing was denied (R. 52, No. 829). In March, 1944, appellee applied to the trial Court for the appointment of commissioners in the condemnation proceedings. On March 16, 1944, appellant filed a plea similar to his plea filed on July 9, 1943 (R. 3, 4), and manifested his intention to file in this Court a petition for certiorari in the equity suit, and on March 30, 1944, the petition was filed. On March 31, 1944, the trial Court fixed April 7, 1944, as the date for entering an order appointing the commissioners. On April 4, 1944, appellant applied to a justice of the Supreme Court of Appeals for an order staying the condemnation proceedings until this Court could pass on the petition for certiorari, and the application was denied. On April 6, 1944, similar application was made to the judge of the trial Court, which was denied, but the condemnation proceedings were postponed until similar application could be made to a justice of this Court, which was done on April 6, 1944

(R. 3, 4). On April 8, 1944, both the petition for certiorari and the petition for stay were denied by this Court (321 U. S. 799).

Appellant's answer in the condemnation proceedings—On April 22, 1944, the appellant filed in the condemnation proceedings a plea, claiming $3,700 as compensation for the land taken for the highway, $21,100 as damages to the residue, interest on the amount awarded as compensation and damages from October 15, 1941, when the land was [illegible]ized, until date of payment, and $200 a month for the unlawful use of the land for highway purposes. The appellant alleged that he was entitled to be compensated for the unlawful use of the land because the statute, Virginia Code, Sections 1969j(4) and 1969j(6), under which the land was mutilated and is being used violates the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that it allowed the appellee to mutilate and disfigure the property and at the same time it restrained the appellant from acting on his own motion and from compelling the appellee to act to have commissioners appointed to view the land before the mutilation and disfigurement were completed. The appellant alleged that he had the right to attack the statute because at the time the appellee instituted the condemnation proceedings the appellant's property had been disfigured by the appellee to such an extent that commissioners appointed by the Court to view the land could not by an inspection of the property determine the value of the entire property as it existed before the disfigurement. The appellant alleged that if the Court should deny compensation for the use already made of his property and allow the use to continue until acquisition of title by the appellee, it would operate to deprive the appellant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States because

the use is based entirely upon the unconstitutional statute assailed by the appellant. The appellant prayed, *inter alia*, for an injunction against the use of the land until title is acquired (R. 4-8).

Appellee's motion, in the condemnation proceedings, to strike the appellant's plea—On May 12, 1944, the appellee filed a motion to strike the appellant's plea (R. 8). He claimed that appellant was not entitled to interest for the delay caused by the appellant "in insisting that the condemnation proceedings be delayed until the termination of the injunction suit" (R. 9), and he thereby admitted that for all other delay in payment the appellant is entitled to interest. The appellee claimed that the appellant was not entitled to additional compensation for the use of the land; that in the equity suit the Supreme Court of Appeals upheld the constitutionality of Sections 1969j(4) and 1969j(6) "insofar as they affect this proceeding" (R. 10); that the commissioners to be appointed by the Court could go on the property and "visualize the conditions and value of the property and award just compensation" (R. 10), but he did not deny the allegations in the appellant's plea (R. 6, 7), which set forth in detail the condition of the property before the mutilation and disfigurement and the condition thereof after the excavations and fills on the property were completed.

Ruling of the trial court in the condemnation proceedings, on the appellee's motion to strike, and order appointing commissioners to view the land—On June 9, 1944 the Court overruled the motion to strike, except that the Court ordered that paragraph 4 of the appellant's plea be stricken, in which paragraph appellant claimed compensation for unlawful use of the property, and the Court expressly ruled that the statute upon which the use was based, Virginia Code, Sections 1969j(4) and 1969j(6), is not in violation of the due process clause of the Four-

teenth Amendment of the Federal Constitution, to which ruling of the Court the appellant excepted; and the Court ruled that the pleading of the appellant should be considered as his grounds of defense (R. 12). The Court appointed commissioners and issued an order that "the Commissioners in the custody of the Sheriff of the County, shall view the land described in said petition with the landowner and the attorneys of record for the landowner, the agent and attorney for the State Highway Commissioner, and a representative of the State Department of Highways" (R. 13). This order was in obedience to the mandate of Virginia Code, Section 1969j(2), which provides: "Upon the selection of the commissioners, the court, or the judge thereof in vacation, shall direct them, in the custody of the sheriff or one of his deputies * * * to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party being allowed to be present and none other, unless otherwise directed by the court * * *."

Viewing of the property, and hearing—In obedience to the order of the Court, the commissioners viewed the property in the company of those mentioned in the order, and accompanied by the trial judge, in the forenoon of July 11, 1944, and upon return to the courthouse testimony was taken before them and the trial judge in the afternoon of July 11, 1944, and on July 12, 1944 (R. 14, 15, 19).

Disposition of the mill issue by stipulation in the condemnation proceedings; and reduction in claim for damages to residue—By stipulation of the parties (R. 19, 20) entered into at the hearing on July 12, 1944, the appellee assumed the burden of keeping clear of obstructions the pipes under the highway and also the tail race where located on the right of way, "so as not to affect the operation of the mill, and so as not to prevent the normal flow

of water to the mill and through the tail race" during the period and time that the mill will be operated, and in consideration of the appellee's assumption of this burden the appellant waived claim to damages to the mill and the operation thereof due to the construction of the new highway, and thereby reduced his claim for damages to the residue of his property from $21,100 to $14,500, calculated as follows:

	Value before construction	Value after construction
Colonial residence and 15 acres	$15,000	$7,000 (R. 22, 23)
Cottage and 10 acres	6,000	2,500 (R. 24, 25)
Barns and outbuildings	3,500	500 (R. 23, 24)
Mill race	1,500	1,500
Mill	7,000	7,000
10 acres, formerly lake and dam	500	500
	33,500	19,000
	19,000	
	14,500	

The appellee apparently intends to make a point of the confusion in the valuation of the parcels. In the Attorney General's designation of the testimony to be printed he singled out one statement (R. 26), but he failed to designate the printing of the questions of counsel for the appellee which caused the confusion. The attempt was made by counsel for appellee to have the appellant give the valuation of the property on one side of the new road and the valuation of the portion on the opposite side. That was not a logical division by which to measure the value of the property before the new road was cut, but it did accomplish the purpose of confusing the matter before the Court and the commissioners. The omission in the printing of

the questions of counsel for the appellee simply adds to the confusion.

Report of the commissioners—On July 12, 1944, the commissioners filed their report, in which they made a finding "that for the fee simple title of the Defendant in the 3.98 acres of land, more or less, the sum of $1,500.00 will be a just compensation, and that there was $6,500.00 damages resulting to the adjacent or other property of the owner from the construction and operation of said highway . . ." The report recited the stipulation by which damages to the mill were waived, and the commissioners stated in the report that they had "considered this stipulation and do hereby make it a part of our findings and our report" (R. 28, 29). Exceptions to the report, filed by both parties, were overruled by the Court, and the report was confirmed (R. 29-34).

Claim for interest, the trial court's ruling thereon, and the appellee's deposit—The appellant's claim for interest was not submitted to the commissioners. On August 11, 1944, the appellant presented to the Court his claim for interest from October 15, 1941, until date of payment, on $6,500, the amount awarded by the commissioners as damages, and waived claim for interest on $1,500, the amount awarded for the land taken, and moved the Court to allow an amendment of the answer to reflect his claim for interest only on the amount awarded as damages (R. 35). In the final decree entered on August 11, 1944, the Court stated its opinion "that the defendant is not entitled to interest on the amount awarded by the Commissioners," and the Court adjudged that the motion to amend be denied and that "the defendant's claim for interest on the $6500.00 from October 15, 1941, until payment, be and the same is hereby denied" (R. 35). The Court ordered that the appellee deposit with the Clerk for the benefit of the appellant the sum of $8,000, to include any deposit thereto-

fore made, and that such amount be paid by the Clerk in accordance with further orders of the Court, and to bear interest at six per cent per annum from August 11, 1944, until paid (R. 35, 36). To all of these rulings the appellant excepted. On August 19, 1944, the appellee deposited with the Clerk the sum of $8,011.84, complying with the order of the Court (R. 37).

Petition for writ of error, and ruling of the Supreme Court of Appeals of Virginia—The appellant signified his election to apply to the Supreme Court of Appeals of Virginia for a writ of error to the rulings of the Circuit Court contained in the final decree and to the rulings of the Circuit Court made on June 9, 1944, on the appellee's motion to strike, and the Circuit Court suspended judgment for ninety days conditioned upon appeal bond being filed (R. 36, 37). The appellant filed the appeal bond, and duly applied to the Supreme Court of Appeals of Virginia for a writ of error to review the rulings of the Circuit Court. Three of the errors assigned were as follows: "1. In denying interest, from the time of entry on the property of plaintiff in error, on the amount awarded by the commissioners as damages, the Court allowed the taking of the property without just compensation in violation of Section 6 of the Virginia Constitution, and deprived plaintiff in error of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution. 2. The Court erred in holding that the statute under which the property was taken (Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6)) is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution. 3. In denying compensation for the use of the property, the use being based upon said statute, the Court deprived plaintiff in error of his property without due process of law contrary to the due process

clause of the Fourteenth Amendment of the Federal Constitution" (R. 39, 40). On November 22, 1944, an order was entered in the Supreme Court of Appeals of Virginia, reading as follows:

> "The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemnation proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and the said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court" (R. 41, 42).

No formal opinion was written by the Supreme Court of Appeals of Virginia.

Petition for appeal to the Supreme Court of the United States—On February 12, 1945, petition for appeal to this Court was presented to and refused by the Chief Justice of the Supreme Court of Appeals of Virginia, who expressed the opinion "that the petition should be presented to a Justice of the Supreme Court of the United States" (R. 42-47). On February 15, 1945, appeal was allowed by the Chief Justice of the United States (R. 47). On April 30, 1945, an order was entered in this Court as follows:

> "The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits, and the case is transferred to the summary docket. The Court desires to hear oral argument only upon the questions whether this Court has jurisdiction of the case, and whether appellant was denied interest

upon his condemnation award in violation of the Fourteenth Amendment". (R. 53).

Specification of Assigned Errors to Be Urged

Only three errors were assigned, and all of them are urged here, as follows:

"1. The Supreme Court of Appeals of Virginia erred in holding that the statute assailed, being Acts 1940, c. 380, p. 666, sections 4 and 6, Virginia Code Supp. 1940, now Virginia Code 1942, sections 1969j(4) and 1969j(6), under which the appellant's property was seized, mutilated, and used by the appellee for highway purposes, is not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that the statute assailed, by vesting in the appellee the power to enter upon and mutilate property and, while mutilating it, to control the time for instituting condemnation proceedings to determine the amount of compensation and damages to be paid, enables the appellee to manipulate a procedural phase of the condemnation, in a manner detrimental to the owner, by holding off the appointment of commissioners to view the property until the appellee has mutilated and disfigured it to such extent that when, in the exercise of the discretion conferred by the statute assailed, the appellee permits the commissioners to view the property they can not visualize the condition thereof as it was immediately before the seizure, the result being to render it exceedingly difficult, if not impossible, for the owner to establish the just compensation for the property taken and the damages to the residue, inasmuch as the Virginia law in condemnation cases is that the viewing of the property by the commissioners is the important and controlling factor in the determination of compensation and damages, outweighing the evidence adduced at the hearing held after the view has been made, and that the compensation is determined by ascertaining the value of the property taken immediately before the seizure, and the damages are determined by ascertaining the difference between the

value of the residue immediately before the seizure and the value thereof immediately after completion of the highway construction; and in that the unconstitutional power and control bestowed by the statute was deliberately and oppressively imposed by the appellee upon the appellant to his detriment and damage.

"2. The Supreme Court of Appeals of Virginia erred in denying to the appellant compensation for the use of his property taken for the highway, in that the use is unauthorized inasmuch as it is based entirely upon the unconstitutional statute assailed, and compensation for the unauthorized use of the property is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

"3. The Supreme Court of Appeals of Virginia erred in denying to the appellant interest on the amount awarded as damages to the residue of the appellant's property from the time of the commencement of the mutilation of the property by the appellee until the appellant receives payment, in that interest on the damages awarded is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States" (R. 44-46).

ARGUMENT

Summary of Argument

1. The statute assailed violates the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it injects into the mandatory procedure for viewing condemned property the absolute and inordinate discretion of the appellee to mutilate and disfigure the property before it is viewed.

The appellant and his property were subjected to and injured by the unconstitutional power conferred by the statute in that his property was mutilated and disfigured while the appellant was held powerless by the appellee's statutory control, and the appellee arbitrarily withheld the viewing of the property until it was impossible to view and value the property in its original condition which is the primary basis upon which compensation and damages are assessed.

II. The due process clause of the Fourteenth Amendment requires the payment of just compensation for the public use of private property prior to acquisition of title by eminent domain. Where the use is accomplished by an unauthorized and willful act, equitable principles as well as the principles of due process require that compensation be measured by the rental value of the property for the use to which it is devoted by the sovereign.

The use of the appellant's property was unauthorized and willful in that it was based upon an unconstitutional statutory power, void *ab initio*, which was exerted against the appellant's property, arbitrarily, oppressively, and with full knowledge that the appellant's constitutional rights were being violated. The appellant is entitled to the rental value for highway purposes, and not simply interest on the amount awarded for the fee simple title to the land used.

III. The right to interest on damages awarded in condemnation proceedings from the time the damage is inflicted to the date of payment is a fundamental right protected by the due process clause of the Fourteenth Amendment.

The denial of interest on the damages awarded was gross and obvious in that the Court by penalizing the appellant for the delay in payment completely ignored the fundamental rules of fairness clearly indicated by the undisputed record facts.

I. Invalidity of Statute Assailed

A. Provisions of Statute

Virginia Acts 1940, c. 380, sections 4 and 6; Virginia Code 1942, Sections 1969j(4), and 1969j(6)

Section 1969j(4), Virginia Code 1942, provides as follows:

"In addition to the exercise of the power of eminent domain, as provided hereinabove, the commissioner is hereby authorized to enter upon and take possession of such property and rights of way, for the purposes set out in section 1969j(1), as the commissioner may deem necessary, and proceed with the construction of such highway. Within sixty days after the completion of the construction of such highway, if the commissioner and the owner or owners of such lands are unable to agree as to compensation and damages, if any, caused thereby, the said commissioner shall institute condemnation proceedings, as hereinbefore provided; and the amount of such compensation and damages, if any, awarded to the owner in such proceedings shall be paid out of the State highway fund, the said commissioner to pay to the landowner or into court, or to the clerk thereof, for his benefit such sum as he shall estimate to be the fair value of the land taken and damage done, before entering upon such land for construction purposes, provided such payment shall in no wise limit the amount to be allowed under proper proceedings. It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto, and to direct the fund out of which the judgment of the court in condemnation proceedings shall be paid, and to provide that in all other respects the provisions of this act shall apply, whether the property and rights of way are condemned before or after the construction of the highway; but the authorities

constructing such highway under the authority of this section, shall use diligence to protect growing crops, pastures, and to prevent damage to any property not taken. So far as possible, all rights of-way shall be acquired or contracted for, before any condemnation is resorted to."

Sec. 1969j(6), Virginia Code 1942, provides as follows:

"A certificate issued by the State Highway Commissioner and counter-signed by the Treasurer of Virginia, stating that any sum or sums of money designated therein will be paid pursuant to the order of any court or courts wherein condemnation proceedings under the provisions of this act are pending, when filed with the said court or courts, shall be deemed and held for the purpose of this act to be payment into the custody of such court or courts. Payment against any such certificate so issued and countersigned, when ordered by the court or courts named therein, shall be paid by the Treasurer on warrants of the Comptroller, issued on vouchers signed by the State Highway Commissioner. A duplicate of each such certificate so issued and countersigned shall be kept as a record in the office of the State Highway Commissioner and a copy thereof shall be filed with the Treasurer of Virginia."

B. Question of Res Judicata

As to the constitutionality of the statute. The decision in *Bailey* v. *Anderson*, 182 Va. 70 (R. 33, No. 829), is not res judicata as to the constitutionality of the statute in question. There the appellant contended that the statute violates the due process clause of the Fourteenth Amendment of the Constitution of the United States on the ground, as the Court stated it, that "the statute does not authorize the institution of condemnation proceedings until sixty days after the completion of the construction of the highway; that such construction might be indefinitely delayed; and that consequently the property owner might

be unreasonably delayed in being compensated for the taking of his property or the damage done thereto." The court declined to consider the constitutionality of the statute, stating that it was unnecessary to do so because the appellant "is now afforded a prompt remedy" in the pending condemnation proceedings, and that unless the appellant "can show that he has been damaged by the operation of the statute, the constitutional question which he seeks to raise is moot as to him" (182 Va. 70, 75, 76).

The ruling of the Court that the payment of compensation had not been unreasonably relayed had no reference to the mutilation and disfigurement of the property. Clearly, the Court recognized that the equity suit did not prevent the appellee from instituting condemnation proceedings because the proceedings were instituted while the equity suit was pending. The Court did not deny that because of the statute assailed, the appellant was unable to force the appellee to institute condemnation proceedings to have the property viewed before it was mutilated and disfigured. The appellee admitted the allegation in the appellant's plea (R. 7) that the mutilation and disfigurement were completed on June 17, 1943, when he instituted the proceedings. The decision of the Court in the equity suit cannot be considered, therefore, as a ruling that the appellee was justified in mutilating and disfiguring the property while he postponed the filing of condemnation proceedings.

As to the right to attack the statute. The decision in *Bailey* v. *Anderson,* 182 Va. 70 (R. 33, No. 829), is res judicata as to the right of the appellant to attack the statute on the ground that it grants to the appellee an unreasonable time, after seizure, in which to institute condemnation proceedings. The decision is not res judicata as to the right of the appellant to attack the statute on the ground that it allows the appellee "to enter and construct

the highway and mutilate and disfigure the property for highway purposes and at the same time restrains the owner from acting upon his own motion and from compelling the petitioner to act to have commissioners appointed to view the land before the mutilation and disfigurement are completed," which is the ground upon which the statute was attacked in the appellant's plea in the condemnation proceedings (R. 5) after the decision in *Bailey* v. *Anderson*, 182 Va. 70, had been rendered. The question of mutilation of the appellant's property while he was under the restraint of the statute and of his inability to have viewers appointed to view the property before completion of the mutilation and disfigurement was neither presented to nor discussed by the Court. The appellant was not obliged to present in his bill in equity the ground of attack presented later in his answer in the condemnation proceedings because he had no right to attack on that ground until the mutilation had been completed, and at the time the bill was filed the mutilation had just been started. Besides, the bill disclosed plainly that the appellant objected to the multilation (R. 27, 28, No. 829). Upon the completion of the mutilation the appellant was not obliged to amend his bill in the equity suit to present the ground of attack presented later in his answer in the condemnation proceedings because the amendment would have served only to apprise the appellee again of appellant's objection to the mutilation, and that would not have enabled the appellee to avoid the mutilation because it had already been accomplished. Therefore, the appellant rightfully waited until he filed his answer in the condemnation proceedings before presenting the second ground upon which he attacked the statute.

As to the appellee's right to open the question. Regardless of the extent of the decision in *Bailey* v. *Anderson*, 182 Va. 70, as to the validity of the statute in its application

to the facts of the controversy, or as to the appellant's right to assail the statute, the appellee is precluded from raising any question concerning it because in the condemnation proceedings he did not contend that the appellant should have presented his ground of attack earlier, the Circuit Court decided that the statute is constitutional (R. 12), thus recognizing that the appellant was injured by the unconstitutional feature presented in his answer and had the right to assail the statute, the Supreme Court of Appeals affirmed the decision of the Circuit Court (R. 41, 42), the appellee did not object to these decisions or appeal therefrom, and it is too late now for him to do so.[1]

C. Points Not in Dispute

Mutilation before payment. The appellant concedes that without infringing the Fourteenth Amendment of the Constitution of the United States a state may authorize the taking and mutilation of private property for highway purposes before payment of compensation and damages, or before condemnation proceedings are instituted, (a) where the statute does not establish a procedure for ascertaining compensation and damages that allows the highway authorities to control the time in which to institute condemnation proceedings,[2] or (b) where the law provides that the highway authorities shall have a reasonable time in which to complete the highway before the condemnation proceedings can be instituted but does not require that the property be viewed by those appointed to determine the compensation and damages.[3] "What is fair in one set of circumstances

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[1] *Stoll* v. *Gottlieb*, 305 U. S. 165, 169, 177; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503.

[2] *Bragg* v. *Weaver*, 251 U. S. 57; *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668.

[3] *Simms* v. *Dillon*, 119 W. Va. 284, 193 S. E. 331, 113 A. L. R. 787.

may be an act of tyranny in others."[4] The appellant does not contend that aside from mutilation of the property the statute is invalid because of the length of the delay in determining the compensation and damages.

Viewing of property. The appellant concedes that without infringing the Fourteenth Amendment a state may require that compensation for private property taken for highway purposes and damages to the residue shall be determined without allowing the property to be viewed by those appointed to determine the amount to be paid to the owner (*Simms* v. *Dillon, supra*), or a state may require that the property be viewed by commissioners appointed to determine the compensation and damages, as provided in Section 1969j(2) of the Virginia Code.

D. Grounds of Invalidity

1. *The Unconstitutional Feature*

The statute assailed does not afford the procedural due process guaranteed by the Fourteenth Amendment of the Constitution of the United States, in that it injects into the Virginia system of viewing condemned property the absolute and unlimited power of the appellee to mutilate and disfigure the property before it is viewed. The constitutional infirmity of the statute is found in the appellee's combined power to mutilate the property and to manipulate the time for the view.

From the earliest times in Virginia, compensation for land taken by eminent domain, and damages to the residue, have been determined by viewers. The viewers may hear testimony as to compensation and damages, but the view outweighs the evidence adduced at the hearing, constitutes the controlling factor in the determination by the viewers

[4] *Snyder* v. *Mass.*, 291 U. S. 97, 117.

of the amount to be awarded, and it is the justification for the rule that the award of the viewers will not be disturbed by the Court in the absence of irregularity.[5]

Just compensation for the property taken is the value thereof immediately before the taking, and damages to the residue are measured by determining the difference between the value of the property immediately before the taking and the value immediately after the mutilation is completed. The value immediately before the taking is the chief element in determining just compensation and damages.[6] The statute grants to the appellee the absolute power to distort and destroy the evidence of that value, so that a view of the property after the mutilation gives to the viewers a false impression as to the value immediately before the taking.

2. Coercive Power Derived from Administrative Discretion

The appellee's power to manipulate the time for the view is dressed in the innocent garb of administrative discretion, shown in the following words of the statute (ante p. 18): "It is the intention of this section to provide that such property and rights of way may, in the discretion of the com-

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[5] *Mitchell* v. *Thornton*, 31 Grat. 164, 176, 177; *Cranford Paving Co.* v. *Baum*, 97 Va. 501, 24 S. E. 906, 907; *Richmond & P. Electric Co.* v. *Seaboard A. L. Ry.*, 103 Va. 399, 49 S. E. 512, 514; *Hunter's Adm'r* v. *C. & O. R. Co.*, 107 Va. 158, 59 S. E. 415, 419, 420, 17 L. R. A. (N. S.) 124; *Barnes* v. *Tidewater Ry. Co.*, 107 Va. 263, 58 S. E. 594-596; *Appalachian Power Co.* v. *Johnson*, 137 Va. 12, 119 S. E. 253, 259; *Duncan* v. *State H. Com'r*, 142 Va. 135, 128 S. E. 546, 549, 550; *Monticello Mineral Springs* v. *City of Richmond*, 147 Va. 355, 137 S. E. 458, 462; *Hannah* v. *City of Roanoke*, 148 Va. 554, 139 S. E. 303, 307; *Shirley* v. *Russell*, 149 Va. 658, 140 S. E. 816, 818; *Yeary* v. *Holbrook*, 171 Va. 266, 198 S. E. 441, 445, 446. See also *Shoemaker* v. *U. S.*, 147 U. S. 282, 304-306; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 558-560; *U. S.* v. *Wise*, 131 Fed. (2) 851, 853.

[6] *Ch. of Highway Com.* v. *Parker*, 147 Va. 25, 136 S. E. 496, 498; *Ch. of Highway Com.* v. *Fletcher*, 153 Va. 43, 149 S. E. 456, 457; *Long* v. *Shirley*, 177 Va. 401, 14 S. E. (2) 375, 379.

missioner, be condemned after the construction of the highway, as well as prior thereto * * *." The statute does not provide that the appellee's discretion shall in no wise limit the right of the owner to have his property viewed before its form has been changed. The words, "shall in no wise limit", shown in the statute, have reference to the amount of the deposit to be made by the appellee based upon his estimate of the "fair value of the land taken and damage done." The only limitation in regard to the appellee's control of the time for the view is that the view must be made in condemnation proceedings which must be instituted within sixty days "after the completion of the construction of such highway." That limitation does not prevent a false view because after the completion of the construction the form of the property is different, and the property must be viewed in that form.

There is no justification for construing the statute to mean that if the appellee delays the construction of the road for an unreasonable time the owner may apply for mandamus to compel the appellee to institute proceedings. After the decision in *Bailey* v. *Anderson*, 182 Va. 70, the statute was amended by a provision authorizing the owner to petition the Court for the appointment of commissioners, and authorizing the Court to appoint commissioners if it be found by the Court "that a reasonable time has elapsed for the completion of the construction of the highway project or that sixty days have elapsed since the completion of the construction of the highway project or that more than one year has elapsed since the Commissioner entered upon and took posession of the property, without condemnation proceedings being instituted * * *."[7] The owner would have the burden of proof; and while it would not be difficult to prove that a particular time had elapsed after entry

[7] Virginia Acts, 1944, chapter 381.

on the property it would be difficult to prove that a reasonable time had elapsed for the completion of the construction of the highway project.

It is not reasonable to suppose that the legislature intended simply to "clarify" the statute by the amendment. This controversy is governed, of course, by the statute before it was amended, since the mutilation was completed and the proceedings were instituted before the amendment. In the statute, before the 1944 amendment, the intention of the legislature is "revealed too distinctly" to permit the Court "to ignore it because of mere misgivings as to power."[8] The words "in the discretion of" (ante p. 18) are not ambiguous or technical. They are used frequently in legal parlance. The Court is not justified in drawing "on some unexpressed spirit outside the bounds of the normal meaning of words."[9] The normal meaning of these words is that the party having the discretionary power is in control. If an exception had been intended the general language, "in the discretion of," would not have been used. The presumption is that no exception was intended.[10] But let it be assumed that under the statute before amendment the Court would have been justified in appointing commissioners if the appellant had shown that a reasonable time had elapsed for the completion of the highway project, and let it be assumed that it would have been justifiable to place on the appellant that heavy burden of proof and that he would have been able to shoulder that burden during 1942 and 1943 when because of conditions

[8] *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379; *Hopkins Fed. S. & L. Association* v. *Cleary*, 296 U. S. 315, 335.

[9] *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617.

[10] Cf. *Chicago, etc. R. Co.* v. *Westby*, 178 Fed. 619; *Fed. Dep. Ins. Corp.* v. *Winton*, 131F(2) 780; *People* v. *Pacific Guano Co.*, 55 Cal. App. (2) 845, 132P(2) 254; *Kirby* v. *Board, etc.*, 129 Conn. 419, 29A(2) 452; *Bederski* v. *P. & F. Pen. Board, etc.*, 4 N. J. Misc. 637, 134A90, aff. 138 A. 918.

arising from the war highway construction was retarded, still that does not reach the question at issue here because the appellee was mutilating the property continuously and by the time the appellant had been able to prove that the appellee had failed to complete the highway in a reasonable time it would have been too late for the commissioners to view the property in its original condition.

The statute can not be construed to mean that if the owner objects to the mutilation and requests a view the appellee must cause the view to be made before the property is changed, or that if the owner presents his objection to the mutilation the Court may in its discretion require a view before the property is changed by the mutilation. Under the statute the appellee is absolutely free to cause the view to be made either before or after the mutilation, regardless of the owner's objections or requests, and the Court is powerless to prevent it. Therefore, the appellant was under no duty to apply to the Court for the appointment of commissioners to view the property before it was changed by the mutilation. The discretion bestowed by the statute upon the appellee plainly displaced the discretion of the Court in the appointment of commissioners to view the property, and the appellant did not have to make a useless request in order to be in a position to attack the statute.[11]

The fact that the appellant tried earnestly and persistently, but unsuccessfully, to prevent the appellee from mutilating the property is no ground for saying that the appellee rightfully mutilated and changed the form of the property before he allowed the commissioners to view it. That the appellant did not want the property mutilated does not prove that it was immaterial to the appellant whether the property was viewed before or after the mutilation. There is no relation whatsoever between the appellant's

[11] *Smith* v. *Cahoon*, 283 U. S. 553.

efforts to save the operation of his mill and the time for the view.

There is no necessity for injecting into the condemnation procedure an injurious impediment in the form of "administrative discretion" which has no relation to the needs of the appellee in the construction of highways. He does not need the power to control the time for the view in order to avoid interference with the construction of the highway. He does not need that power in order to commence construction before questions of title and compensation are settled or before proceedings are instituted. These are important matters in the construction of highways, but they can be accomplished without laying hands on the viewing procedure. (Cf. *City of Oakland* v. *U. S.*, 124 Fed. (2) 959.)

The phrase "in the discretion of" was in the original statute (Virginia Acts 1922, c. 403, section 10), and has never been removed by any of the amendatory acts (Acts 1924 c. 448; Acts 1928, c. 472; Acts 1934, c. 377; Acts 1940, c. 380). The statute was enacted in 1922 in accordance with the request of the State Highway Commissioner. His report in 1921 contained the following recommendation: "That some fair and equitable right of way law be enacted. This has been one of the most serious difficulties which has been met by this department. In many instances the values of properties, assessed at a few dollars per acre, have, under condemnation, increased from five hundred to fifteen hundred per cent." [12] In other words, the Commissioner complained, for example, that instead of being able to acquire farm land for $5.00 an acre, a value estimated by the assessors for tax purposes, he was confronted by prices asked by the farmers ranging from $55.00 to $155.00 an

[12] Published Report of State Highway Commissioner of Virginia for period of two years ending September 30, 1921, "Third" recommendation.

acre. Obviously the Commissioner was unreasonable in his desire to fix prices on the basis of values fixed by the tax assessors; and in expressing a desire for the enactment of a "right of way law" he envisaged a law that would be "fair and equitable" to the Commonwealth, a law that would enable him to meet the "serious difficulties" placed in his way by owners who thought their properties were worth more than the tax assessors had estimated. One can not read the Commissioner's recommendation without sensing his desire for a power in the "right of way law," the condemnation statute, by which he would have the advantage in his negotiations with owners so that he could keep prices close to the values fixed by the tax assessors. The answer to this recommendation was the enactment of the statute.

The desire of a state to acquire rights of way at low cost is no justification for placing an owner virtually at the mercy of the State Highway Commissioner in negotiations for a settlement. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." [13]

The coercive aspect of the appellee's discretionary power to mutilate the property and to set the time for the view is glaringly illustrated by his agent's warning to the appellant that if he refused to accept the sum of $2,000 offered as compensation and damages the property would be seized by the appellee, the highway would be constructed, and the appellant would be compelled by the statute to wait until sixty days after completion of the construction of the highway before he could have the amount of his compensation and damages determined. The appellant refused to consider this offer (R. 25, 26). The appellee carried out the

[13] *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, 416.

threat by seizure and mutilation, and by a delay until the mutilation was completed before instituting condemnation proceedings to have the property viewed by commissioners, a period of one year and eight months from the date of the seizure (R. 5, 6, 7). Although the appellee offered only $2,000, and deposited with the clerk only $1,500, the Senior Highway Engineer testified at the hearing that the amount should have been $3,000 (R. 16, 17, 18), the commissioners awarded $8,000 (R. 28, 29) which did not include damage to the mill as that was excluded by stipulation (R. 19, 20), and the appellant claimed approximately $25,000 (R. 4, 5; pars. 1 and 2 of plea) which included damage to the mill. The appellant was the only one who knew the property intimately before it was torn and disfigured by the appellee. Even assuming that his estimate was too high, still the award was over 400 per cent more than the amount deposited by the appellee when he seized the property, and the award did not include damage to the mill.

The appellee appropriately exercises discretion in matters of highway construction. His power, as well as the condemnation procedure, is "perverted from its proper function" (dissent in *Reed* v. *Allen*, 286 U. S. 191, 209) when his discretion is injected into matters relating to procedural due process and used to deny a fundamental right and to oppress one who is subjected to his control.

3. *Destruction of Material Evidence*

Acting under the statute assailed, the appellee withheld and destroyed evidence that was material and important in the determination of the amount to which the appellant was entitled. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."[14] No real opportunity to protect against an inadequate assess-

[14] *West Ohio Gas Co.* v. *P. U. Com.*, 294 U. S. 63, 69.

ment of the compensation and damages was afforded to the commissioners after they had viewed the property in its mutilated condition.[15] The disclosure was not "full and candid"[16] because the appellee, acting under the statute, made it impossible for the viewers to see without interference the original condition of the property.

The appellant would not be in a position to object to the view if the viewers had awarded him what he claimed, but the fact that the estimate of the appellee's witnesses was less than the amount awarded does not prove that the appellant received no injury from the view. Presumably the viewers were disinterested and qualified, since they were appointed by the Court without suggestion from the parties, but the appellee's witnesses were picked by him. The appellee filed exception to the award on the ground that it was higher than the estimate of his witnesses (R. 30-33). The Court overruled the exception (R. 34), and in effect held that the estimate of the appellee's witnesses was not to be taken as conclusive proof of the amount to which the appellant was entitled. No appeal was taken by the appellee. He is not in a position to claim now that the appellant was not injured by the view on the theory that the appellee's witnesses proved what the appellant was entitled to and the appellant was awarded more than that. Aside from that, the damage to the appellant lies in the falsity of the view, not in the extent of the discrepancy between the estimate of the appellee's witnesses and the amount of the award. The right to have assistance of counsel, "is too fundamental and absolute to allow courts to indulge in nice calculations

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[15] *Saunders* v. *Shaw*, 244 U. S. 317, 319; *Brinkerhoff-Farris T. & S. Co.* v. *Hill*, 281 U. S. 673, 682; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *Snyder* v. *Mass.*, 291 U. S. 97, 116, 121; *Morgan* v. *U. S.*, 298 U. S. 468, 480, 481; *Ohio Bell Tel. Co.* v. *P. U. Com.*, 301 U. S. 292, 304, 305.

[16] *Roberts* v. *New York*, 295 U. S. 264, 278.

as to the amount of prejudice arising from its denial,"[17] and the same may be said of the right to have a fair view?

In *Snyder* v. *Massachusetts* (291 U. S. 97), if the gas pumps had been material items in Snyder's defense, and if the state had permitted the district attorney to remove the pumps from the scene before the jury made the view, undoubtedly the accused would have been deprived of a right "ranked as fundamental" (p. 105), even though the accused had been afforded every opportunity to introduce at the trial, after the view, evidence to show the condition of the premises before the removal of the pumps, and even though he had been convicted of manslaughter in spite of the state's evidence strongly indicating that he was guilty of murder, and even though there had been a wide discrepancy between the evidence for the state and the evidence for the defense. The right to a fair view is not less fundamental because it concerns property rather than life. Procedural fairness is not confined to criminal cases. In applying the constitutional security no valid distinction can be made between the withholding of evidence in a proceeding in which the owner is deprived of his property without his consent, and the withholding of evidence in a criminal case, particularly where, as in the Virginia condemnation procedure,[18] the determination of those to whom the evidence would have been submitted "exacts and receives a proper deference from courts."[19]

4. *Inappropriateness of Procedure*

The statute does not provide for the owner the procedure in regard to the viewing of the property that is appropriate to the Virginia method of determining the amount of the

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[17] *Glasser* v. *U. S.*, 315 U. S. 60, 76.

[18] See cases cited in note 5, *ante*.

[19] *Ohio Bell Tel. Co.* v. *P. U. Com.*, 301 U. S. 292, 304.

compensation and damages.[20] That the owner has no fundamental right to a view is no reason for requiring a view and then compelling the owner to take compensation and damages determined by a false view. Where the view is mandatory the owner has a fundamental right to fairness, which requires that an opportunity be afforded the owner to have a view before the property is changed to an inferior form. Where a view is not required in the system of condemnation, a view before mutilation is not fundamental because it bears only a "shadowy" relation to the determination of the compensation and damages. Where a view is mandatory in the system of condemnation, a view before mutilation is fundamental because the "inevitable effect" of the view is "that of evidence" and the view bears "relation, reasonably substantial, to the fullness of his opportunity" to establish the amount of the just compensation and damages to which the owner is entitled.[21] The procedure should be shaped so as to safeguard the fundamental right to a fair view where the view is mandatory in the system of condemnation, as it is in Virginia. Under the statute assailed the procedure is shaped "in absolute disregard of the owner's right to just compensation,"[22] contrary to the due process clause of the Fourteenth Amendment, in that the owner must wait until the original condition of his property, which is the very basis upon which the amount of the award is determined, has been completely removed by the appellee from the view of the commissioners appointed by the Court to view the land. Such a system of condemnation is not even "fair upon its face."[23]

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[20] *Davidson* v. *The Board of Administrators*, 96 U. S. 97, 105; *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 246.

[21] *Snyder* v. *Mass.*, 291 U. S. 97, 105, 106, 108, 121.

[22] *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363.

[23] *Roberts* v. *New York*, 295 U. S. 264, 277.

"A minimum requirement of due process, allowing for variations in method, is always that a procedure be afforded under which he whose property is to be taken shall be allowed to be heard; that the determination under which he is required to surrender it be reasonable, and that it be free from the opportunity for arbitrary power."[24]

II. Compensation for Use of Property

A. Due Process Clause of Fourteenth Amendment

The due process clause of the Fourteenth Amendment prohibits a state from taking and using private property without paying just compensation.[25] The appellant claimed compensation for the use of the property for highway purposes. The basis of the claim was that the use was unauthorized and illegal because it was based entirely upon the unconstitutional statute assailed (R. 5-8). The ruling denying compensation for use (R. 12) was not based upon an appraisal of the facts. It was not an application of the law to the facts. It was a ruling made necessary by the previous ruling that the statute does not violate the Fourteenth Amendment. If the Court had ruled that the claim for use was not a valid claim because the appellant had the use of the property or could have used the property at the same time the appellee was using it, that would have been a ruling based upon an appraisal of the facts. That the appellant has been deprived of the use of his property since October 15, 1941, is an undisputed fact. If the denial of compensation for use was based upon the

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[24] *Noyes* v. *Erie & Wyoming Farmers' Co-op. Corp.*, 10 N. Y. S.(2) 114, 123.

[25] *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 246; *A. Backus Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565; *Appleby* v. *Buffalo*, 221 U. S. 524, 532; *McGovern* v. *New York*, 229 U. S. 363, 370; *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363, 365; *Dohaney* v. *Rogers*, 281 U. S. 362, 366; *Roberts* v. *New York*, 295 U. S. 264.

theory that the appellant's equity suit necessitated the use of the land for highway purposes before and after the condemnation proceedings were instituted, the denial was "gross and obvious" (*Roberts* v. *New York*, 295 U. S. 264, 277) because the condemnation proceedings were brought while the equity suit was pending and the proceedings were postponed by agreement until the equity suit was decided, and there was nothing in the agreement to show that the appellant acquiesced in the use or agreed that the use would be without compensation.

B. Relation of Title to Use

Without the owner's consent the state may acquire title and may use the property before acquiring title, but just compensation must be paid for the use.[26] That the sovereign may provide by statute for the passing of title, without the owner's consent, by filing a written declaration of taking before the property is used and before the entire compensation for the property is paid,[27] is no reason for saying that without a statute accomplishing that result the property may be used by the sovereign free of charge before the title is acquired by condemnation proceedings. The system of private property can not survive without a full recognition of the principle that in the absence of agreement the ownership of title determines the right to use property without having to pay for the use.

C. Measure of Compensation for Authorized Use

In *U. S.* v. *Rogers*, 257 Fed. 397, 400, where land was flooded pursuant to statute, the Court said: "When in the exercise of its sovereign power the government actually

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[26] *U. S.* v. *Rogers*, 255 U. S. 163; *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299.

[27] *City of Oakland* v. *U. S.*, 124 F. (2) 959.

appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise. Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the difference here is but in degree, not in principle."

In *U. S.* v. *Rogers*, 255 U. S. 163, 169, it is stated that "the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled." In *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299, it is said that compensation is "the full and perfect equivalent of the property taken"; that compensation "rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken"; that where the owner has been deprived of "the land and its use since the taking" he is entitled "to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added" (261 U. S. 299, 304, 306). In neither of these cases was there any question as to the validity of the authority by which the property was used before the title was acquired, and the decisions do not lay down the rule that where property is seized by an agent of the sovereign and used by the public without any authority interest is a "convenient and fair method" or a "good measure" for determining compensation for the use.

D. Measure of Compensation for Unauthorized Use

1. *Statement of Contention*

The appellant contends that since the use of his property without first acquiring title is based entirely upon the unconstitutional statute assailed, there was no more authority for the use than there would have been if the statute had not been enacted. He contends that in denying compensation for the unauthorized use of the property the Court deprived him of his property without due process of law in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

As compensation for the unauthorized use of the property, the appellant claimed compensation at the rate of $200.00 a month (R. 5), approximately $6.50 a day, and not merely interest at six per cent on $1,500.00, awarded for the value of the property, which would be only $7.50 a month, approximately twenty-five cents a day. For four years the appellant's property has been used illegally as a part of an important state highway. It would be a travesty of justice, as well as an inducement to lawless seizure of private property, to allow the state to use the property for the nominal sum of twenty-five cents a day. The appellant contends that failure to compensate him on the basis of the actual rental value of the property as a part of a state highway would deprive him of his property without due process of law contrary to the Fourteenth Amendment; but whether that be so or not, he contends that if the statute assailed is declared unconstitutional his right to recover the actual rental value of the use is based upon equitable principles which have been fully recognized by the highest Court in Virginia.

2. *Claim for Just Compensation*

The appellant's right to be compensated for the unauthorized use of the property by the state is not based upon a tort of the appellee committed while acting outside the scope of his authority because the wrongful character of his seizure derives from the statute upon which the seizure was based.[28] The Commonwealth of Virginia has enjoyed the benefit of the use of appellant's property for state highway purposes without paying anything for it,[29] and the use has been accomplished through the operation of the unconstitutional statute, not through the presumptuous act of the appellee. Whether the appellant has a cause of action against the appellee in his individual capacity because of the damage inflicted by his mutilations while acting under the authority of the unconstitutional statute is a question not related to the just compensation for the use of the property by the Commonwealth as a public highway.

This is not a case in which a tort has been waived and a claim made against the state.[30] It was not necessary to resort to the statutory procedure for presenting claims against the state, as provided in Virginia Code 1942, section 2578, because the appellant's claim is for just compensation in a proceeding brought by the state. The sovereign may deny liability or may restrict the procedure for enforcing liability, but it can not prevent an owner from claiming just compensation for the unauthorized public use of his land without infringing the Fourteenth Amend-

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[28] See *Wilson* v. *State Highway Com'r.*, 174 Va. 82; *Sayers* v. *Butlar*, 180 Va. 222. Cf. *Home Telephone, etc., Co.* v. *Los Angeles*, 227 U. S. 278; *U. S.* v. *N. A. T. & T. Co.*, 253 U. S. 330, 333; *U. S.* v. *Classic*, 313 U. S. 299, 325, 326.

[29] See *Nelson County* v. *Coleman*, 126 Va. 275; *United States* v. *Creek Nation*, 295 U. S. 103, 108.

[30] *Com.* v. *Chilton Malting Co.*, 154 Va. 28.

ment.[31] It would not be due process for the state to provide that title by eminent domain shall be acquired through proceedings in the county where the land lies but that the compensation shall not be considered in the proceedings, leaving the owner to seek compensation by a special action on his own motion under section 2578 of the Code, which requires claims to be presented at Richmond.

If the statute assailed had not been enacted and the state had used the land for a public highway without bringing action to acquire title the appellant would have had a remedy by mandamus to compel the appellee to institute proceedings to determine just compensation for the use of the land, and that would have been his only remedy.[32] Since the appellee brought the proceedings as the agent of the state, the appellant had the right to present in the proceedings his claim for just compensation for the use of the land.

Liability for the value of the highway use does not change the nature of the obligation. It is still just compensation, and must be recovered in condemnation proceedings. In *Carter v. Town of Pearisburg*, 173 Va. 346, the Court said that to deny compensation for use would be a denial of just compensation. If the owner in that case had waited until the condemnation suit had been instituted and had then claimed compensation for the rental value of the property, it is inconceivable that the Court would have said that while the claim was for just compensation it could not be presented in a suit brought by the town to establish just compensation for the land taken. That case, of course, did not involve a claim against the state, but it is sufficient authority for treating the use claim as a claim for just com-

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[31] Cf. *Seaboard Air Line R. Co. v. U. S.*, 261 U. S. 299, 306.

[32] *Wilson v. State Highway Com'r.*, 174 Va. 82; *Hicks v. Anderson*, 182 Va. 195.

pensation, and the latter may be presented in condemnation proceedings.

3. *Compensation for Rental Value Instead of Interest*

Where public use is made of private property without authority and without the owner's consent prior to acquisition of title, just compensation for the use is measured by the actual rental value of the property used, not by interest on the amount awarded for the value of the property in subsequent proceedings. With respect to the remedies for the redress of unauthorized use of private property there is no difference between acts committed under color of eminent domain and those committed without color of that power.[33]

Due process requires that unauthorized seizures of private property be differentiated from those that are authorized by valid statute, regulation or Court order. Without that distinction due process would present no obstacle to governmental encroachments. In highway construction, there would be no incentive for controlling by statute or Court order the authority of highway officials to take possession because control is exerted to protect the owner, not to facilitate the construction of highways. Due respect for ordered liberty demands a rule designed to prevent the wresting of private property by oppressive state action. The due process security of the Fourteenth Amendment is not less potent than the just compensation mandate of the Fifth Amendment in preventing the application of a rule for measuring compensation that would lead to oppressive deprivations in the exercise of eminent domain.[34] If the payment of interest is the only consequence of the unauthorized use of private property for public purposes, state

[33] *Lewis on Eminent Domain*, 3rd edition, section 953.

[34] Cf. *U. S. v. General Motors Corp.*, 323 U. S. 373.

officials, railroads, and others may romp at will over private lands merely because they have the power to acquire title by eminent domain. The Court has said that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."[35]

In *Evelyn Bldg. Corp.* v. *City of New York*, 257 N. Y. 501, a rock slide occurred during excavations for a subway. Without the owner's consent, and without statutory authority, piers were constructed on the abutting property in order to secure the work and safeguard the subway structure as completed. The trial court treated the case as one to condemn an easement and awarded damages on that basis, treating the city as the owner from the time of entry, and refused to consider the claim of the plaintiff that he had been deprived of the use of the property. The Court of Appeals, by unanimous decision in which Chief Judge Cardozo participated, held that the plaintiff was entitled to recover "his loss, if any, because of deprivation of the use of his land up to the time of the trial," and the Court said that it was error for the trial court "to treat the city as owner from the date of the slide" (257 N. Y. 501, 510). The Court did not say or imply that interest would be the only amount that the owner could recover.

In *Fletcher* v. *Delaware L. & W. R. Co.*, 79 Fed. (2) 306, the railroad company maintained tracks across private property without the owner's consent, claiming that it had an easement over the land derived from a permit issued by the state. The Court held that the permit was revoked when the state sold the land and that the owner was entitled to recover damages for loss of rentals and damages for the value of the easement, and that upon payment of

[35] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324.

the latter the owner should convey the easement to the railroad. See also, *Hustead* v. *Barron*, 75 Fed. (2) 169, 170, which recognizes the same principles.

In *Carter* v. *Town of Pearisburg*, 173 Va. 346, the town had for many years been obtaining a portion of its water supply from springs located on private property, the water being piped across the property free of charge with the owner's consent. On November 2, 1936, the owner notified the town that on a given date there would be a monthly rental charge for the use of the property. The town continued to use the property without paying the monthly rental charge, and the owner brought an action to recover possession. The town filed a bill to enjoin the owner's suit and his interference with the use of the property, and claimed ownership by gift, prescription or estoppel. The claim of the town was denied by the lower Court. The town then acquired title by condemnation proceedings. The Supreme Court of Appeals of Virginia held that "when it had been judicially determined that the town's right to use the water and lands terminated on November 2, 1936, it necessarily followed that the owners of the property were entitled to a fair rental for such use after that date. To hold otherwise would amount to depriving these owners of their property without due process of law and appropriating it to public use without just compensation in violation of their constitutional rights. (Constitution of Virginia, Section 11, 6.)" (173 Va. 346, 350.) The Court held that the owners were entitled to recover "rental for the use of their property from the date of the revocation of the permissive use thereof, November 2, 1936, to the date when it is admitted that the appellee acquired title to such property by condemnation, April 29, 1938, at the rate of $50 per month, with interest and costs." (173 Va. 346, 351.) It is not shown what the award was for the value of the land taken for the pipe line and for the easement in the springs, but

evidently it was small because the town objected to paying $50 a month in view of the small amount awarded for the value of the land. It did not require a wide strip of land for the pipe line, and if the pipe was under ground the owner could still make use of the land. While the award had some bearing upon the value of the use it was not controlling and it is indicated that interest on that amount would have been far below $50 a month allowed for the rental value of the land. The owner's demand of that amount was not controlling because if it had been the amount awarded for the land and the question of due process would have been immaterial.[36]

"There are two instances of Congressional ratification of takings which turned tortious acts into the exercise of the power of eminent domain and placed upon the Government the duty to make 'just compensation,' including sums in the nature of interest. These are United States v. Creek Nation and Shoshone Tribe v. United States." (*U. S.* v. *Goltra*, 312 U. S. 203, 208, 209.)

In the *Creek Nation* case, 295 U. S. 103, no claim was made for the rental value of the land used. The claimant was satisfied with an additional amount representing interest on the value of the claimant's rights in the lands to which the United States had title. The Court upheld the claim for interest in the following words: "Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added" (295 U. S. 103, 111). The Court did not say that interest was a "fair method", as stated in *U. S.* v. *Rogers, supra*, or a "good measure", as stated in *Seaboard Air Line R. Co.* v. *United States, supra*. Apparently the Court felt that while interest might not be a fair or a good measure it was a suitable measure if the claimant was satis-

[36] That the owner can not establish the compensation by simply demanding a certain amount, see *Galveston Wharf Co.* v. *Gulf C. & S. F. R. Co.*, 72 Texas 454, 10 S. W. 537.

fied with it. That the claimant was satisfied with interest is evident, and the reason apparently was that it would have been difficult to determine the value of the use made of the lands since they were divided into tracts and conveyed to various patentees. It was difficult, no doubt, to assess the value of the rights in the lands. When the case was presented again after the second award the Court stated that a "fair approximation or average of values may be adopted * * *" (302 U. S. 620, 622). Because of the peculiar conditions in this case, the decision does not lay down the rule that where the use is illegal the owner is confined to interest on the amount awarded for the land taken.

In *Shoshone Tribe* v. *United States*, 299 U. S. 476, the claimant was satisfied with interest, and did not make any claim for an assessment of the value of the use on any other basis. By agreement the claim was for interest at 7% (see agreement of parties), which obviously was more advantageous to the claimant than the rental value of all the different tracts taken by the hostile Indian tribe over a period of years, beginning in 1878 (299 U. S. 476, 494, 495). That the compensation for illegal use may be assessed on a different basis, if the owner desires it and if it is practicable, is clearly shown by the following statement of the Court: "The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances" (299 U. S. 476, 496).

—In the light of all the circumstances; the rental value is a suitable standard by which to measure the increment to complete the just compensation to which the appellant is entitled. In the appellant's plea he claimed interest on the amount to be awarded as compensation and damages (R. 5), but after the commissioners awarded $6,500.00 as damages

and only $1,500.00 as compensation for the value of the land taken (R. 28, 29) the appellant waived interest on the latter amount (R. 35) and thereby elected to stand on his claim (R. 5) for compensation based upon the rental value of the land taken for highway purposes. The appellee did not object to the form of the appellant's plea or to the appellant's course in waiting until he knew what the amount of the award would be for compensation and damages before he elected to stand on his claim based upon rental value rather than interest. No harm was done by the appellant's course and election, since neither the matter of interest nor the question of compensation for use was submitted to the commissioners. This is shown by the recital in the report of the commissioners "that, for the fee simple title * * * the sum of $1,500.00 will be a just compensation" (R. 28, 29). There is nothing to indicate in the slightest degree that they ascertained the entire just compensation to which the appellant was entitled according to the facts in the case. (See *Moll* v. *Sanitary Dist. of Chicago*, 228 Ill. 633, 81 N. E. 1147, 1148.)

Since the use was illegal, the appellee should not be permitted to elect to pay interest, amounting to only twenty-five cents a day.

4. *Compensation for Rental Value for Highway Purposes*

If the appellee, in his official capacity, had been a trespasser acting under the unconstitutional statute by mistake or in good faith believing that he had the right to use the land, and without any warning to the contrary, the appellant's recovery would have been restricted to the rental value of the land for farming or residential purposes,[37] which would have been less than the rental value of the

[37] *Galveston Wharf Co.* v. *Gulf C. & S. F. R. Co.*, 72 Texas 452, 10 S. W. 537, 539; 63 C. J. pp. 1052, 1053, sections 253, 254.

property improved as a highway. The appellant contends that the appellee, acting in his official capacity, was a trespasser of the opposite type, acting willfully and being conscious of the violation of the appellant's rights. He paid no attention to the warnings confronting him, and acted at his peril. Acting under the unconstitutional statute, the appellee deliberately seized the land and used it for highway purposes in the face of two decisions of the highest Court in the sister State of West Virginia denouncing the same statutory procedure,[38] and in the face of the appellant's equity suit in which the statute was attacked. The trespass upon the appellant's land is not less wilful because the legislature, in enacting the statute assailed, authorized the use of the land in ignorance of the requirements of due process, or because the appellee may have had advice from the Attorney General that in spite of the decision in *Bragg* v. *Weaver*, 251 U. S. 57, and the two *West Virginia* cases, the appellee had the right to ignore the appellant's objections to the use of the property under the statute and to proceed with the mutilation and restraint, or because the appellee was ignorant of the legal objections interposed.[39]

The appellant had no power to prevent the appellee from acquiring the title. The appellant sought to prevent the destruction of the operation of his mill, not to prevent the filing of condemnation proceedings. If the appellee had been acting in good faith he would have brought the condemnation proceedings immediately after the appellant filed his equity suit. That would have enabled the state to acquire the title to the land and to use it as state property. It would have put an end to the appellant's constitutional

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[38] *McGibson* v. *Roane County Court*, 95 W. Va. 338; *Simms* v. *Dillon*, 119 W. Va. 284.

[39] *Guffey* v. *Smith*, 237 U. S. 101; *Union Naval Stores Co.* v. *United States*, 240 U. S. 284.

objections to the statute. It would have enabled the viewers to see the property in its original condition. It would have settled the mill question because in order to avoid the payment of damages for the injury to the mill operations the appellee would have agreed to keep the water flowing to the mill, since that is what he agreed to do in the condemnation proceedings which he finally brought. There is no basis for the belief that the appellee seized the land, fully intending to institute condemnation proceedings within a reasonable time after the seizure and before the land was seriously mutilated so that the appellant would have a fair opportunity to show the viewers the land in its original condition. The property was mutilated and used for highway purposes, and the appellant was placed under the restraint imposed by the statute, for one year and eight months before the appellee instituted the proceedings (R. 5-7). It is clear that the proceedings were instituted to establish a basis for the decision in the equity suit that the appellant had a "prompt remedy" and could not attack the statute (R. 36, 37, No. 829). There is no ground for contending that the proceedings were not instituted earlier because of the appellant's interference. The appellant was the victim of the deliberate use of the oppressive power which the legislature created and placed in the hands of the appellee. If the appellee contends that the condemnation proceedings were instituted merely because the highway had been completed, without any thought of defeating the appellant's attack on the statute, then it is fair to have him state the date of the completion of the highway, and whether the completion was before or after March 5, 1943, when the appeal in the equity suit was granted (R. 21, No. 829), and he should explain why the proceedings were instituted on June 17, 1943 (R. 1), and whether the selection of that date for instituting the proceedings had any reference to the fact that the appeal in the equity suit was placed on the docket

for the June session of the Court, which began on June 7, 1943.

In the equity suit the Court did not find that the property was used for highway purposes in good faith. It found that the appellee was not arbitrary in his selection of the new highway course (R. 34, No. 829), that the appellant had a "prompt remedy" (R. 37, No. 829), and that it was unnecessary to consider the statute under which the land was used (R. 36, No. 829), but the Court did not discuss or mention the appellee' good faith or bad faith in devoting the land to state highway purposes in the right of the warnings he had and of the circumstances under which he instituted the proceedings and prevented the statute from being considered. The Court did not discuss or consider the use.

The appellant contends that when a state official has ample opportunity to satisfy the owner's fundamental rights and simultaneously to proceed with the public use of the land, and then willfully ignores the opportunity, uses the land for the state relying upon palpably illegal legislative authority, and by artificial means convinces the Court that the owner has no right to attack his authority, the state should pay the owner just compensation for the use of the land in accordance with the rule of justice that allows full return of the actual benefit derived from the use, represented by the fair rental value of the use of the property in its improved condition, rather than in accordance with some rule of convenience that allows only a nominal recovery not related to the improved use of the property.[40]

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[40] *Kester* v. *Bostwick*, 153 Fla. 437, 15 S. (2) 201, 205, 207, where the Court, referring to the "red lights" confronting the defendant, said: Defendant saw them and ran over every one of them. He took a chance and lost • • •." *Martin* v. *Smith*, 214 Minn. 9, 7 N. W. (2) 481; *Gilley* v. *Williams*, 43 S. W. (Texas Civ. App.) 1094, writ denied by

If payment of the rental value of the use of the property as a highway constitutes a part of the just compensation arising from the acts of the appellee acting within the scope of the authority intended by the legislature, the payment can not be avoided on the ground that the obligation is based upon a tort committed by the state's agent for which the state has not consented to be liable, because the payment of just compensation is a fundamental obligation which the state can not escape. A state may deny or accept liability for the torts of its agents, but it does not have that choice with respect to liability for just compensation [41] even though the right to just compensation derives from the tort. The right to just compensation does not depend upon principles of agency, but liability based upon principles of agency does not displace the right to just compensation. As the Court stated in *Wilson* v. *State Highway Commissioner*, 174 Va. 82, the appellee's "official relationship, as an agent, would fix liability, if any there be, upon his principal, the State" (p. 89), but the Court pointed out that the liability is enforced by condemnation proceedings (p. 93). For a willful tort of an agent, acting within the scope of his authority, an individual principal is liable, of course, even though he receives no benefit from

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Supreme Court of Texas; see also *Little Rock* v. *Jeuryens*, 133 Ark. 126, 202 S. W. 45, and *Winn* v. *Raney*, 153 Ga. 641, 113 S. E. 8; compare *Quality Excelsior Coal Co.* v. *Reeves*, 177 S. W. (2) (Ark.) 728, 731, 732, and *Lindberg* v. *Linder*, 133 Cal. App. 213, 23 P. (2) 842. As to owner's option, see *Hines* v. *I. N. S. Co.*, 101 Miss. 802, 58 S. 650, 651, and *Irwin* v. *McElroy*, 91 Ore. 232, 178 P. 791, 792. *Searl* v. *School Dist. No. 2, etc.*, 133 U. S. 553, is distinguishable because the district acquired possession before the owner acquired his interest, and there was no evidence of oppressive or disingenuous conduct or of disregard of an opportunity to avoid the result; also the owner claimed the value of the entire improvement, not merely the value of the use. The point is discussed in 28 C. J. S., p. 1036; 63 C. J., p. 1056, sec. 257.

[41] *Jacobs* v. *United States*, 290 U. S. 13.

the agent's act,[42] but to make the state liable for just compensation it is necessary to show that the state accepted a benefit, or that the damage was done in the furtherance of a public purpose.[43] The appellee acted within the scope of his statutory authority when he seized and used the land for state purposes. When he arbitrarily and willfully postponed the filing of condemnation proceedings for one year and eight months, and mutilated the property in the meantime, and when by filing the condemnation proceedings he thwarted the appellant's attack on the statute; he was acting in the furtherance of his service to the state, as contemplated by the statute, and he was using the means and methods contemplated by the legislature or necessarily resulting from the operation of the statute.[44] There could be no doubt of the sovereign obligation to pay just compensation for the use of the property as a highway if the legislature, believing it to be in the public interest to acquire lands for highways at low cost, had expressly authorized the appellee to seize, mutilate, and withhold the viewing of the property of those who refused to accept the amount offered by the appellee as compensation for the land taken and damages to the residue.[45] That the legislature would never express the purpose so boldly is no reason for allowing the state to escape when it authorizes the act by implication, or facilitates the accomplishment of the act. Of the three main elements of condemnation, viz., possession, compensation, and title, the statutory power of the appellee to control the filing of the proceed-

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[42] *Jeff. Stand. L. I. Co. v. Hedrick*, 181 Va. 824, 27 S. E. (2) 198, 202.

[43] *Wilson* v. *State High. Com'r.*, 174 Va. 82.

[44] Mecham, Outline of the Law of Agency (3rd ed.), sections 499-528.

[45] "The purpose • • • is shown in the enactment • • • and is about to be carried into effect by her officers acting in her name and at her command. The state is the principal and the action of her officers rightly may be imputed to her, even though a suit for injunction might lie against them." *Penn.* v. *W. Va.*, 262 U. S. 553, 591.

ings applies solely to the second element. Possession can be acquired without postponing the filing of proceedings. There is no point in postponing the filing of proceedings in the acquisition of the naked legal title. By controlling the time for filing the proceedings the state has a decided advantage in negotiating with the owner for a settlement on terms framed by the appellee. That the legislature when it passed the statute had before it the strong recommendation of the State Highway Commissioner that a statute should be enacted to make it possible to bring down the excessive demands of property owners, whose valuations greatly exceeded those of the tax assessors, shows that the control of the filing of the proceedings was given to the Commissioner by the legislature to carry out his desire to have a better bargaining position in making settlements with owners. The control was not given to him without any definite purpose in mind, and the purpose has no relation to anything whatever except the compensation. The control is the mainspring of the statute, and it has remained untouched since 1922 except for the mild limitations placed upon it in 1944 after the decision in the equity suit (*Bailey* v. *Anderson*, 182 Va. 70).[46] In seizing, mutilating and using the appellant's property and in postponing the filing of proceedings until the property had been radically changed, the appellee did what the legislature told him was "lawful and proper" to do.[47] In fact, if the legislature had not told him he could do it, clearly it would have been wrongful, unlawful, and improper. The point is, however, that the statute authorizing him to do it was wrongful, unlawful, improper, and in violation of the Fourteenth Amendment. It conferred power "which in the natural and ordinary course may involve the use

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[46] See R. 26, 30, ante.

[47] *Wilson* v. *State Highway Com'r.*, 174 Va. 82, 92, 93; 3 C. J. S., pp. 186, et seq.

of force upon third persons," and it committed to the appellee "the determination of the particular occasion upon which such force is to be used and the particular degree of force which is to be applied."[48]

The Commonwealth has derived a benefit not only from the use of the property but also from the appellee's artificial avoidance of the attack on the statute. The decision in *Bailey* v. *Anderson*, 182 Va. 70, operated to keep the statute intact until the legislature could amend it.[49] The Commonwealth has displayed its reluctance to relinquish the control vested in the appellee, which proves that the legislature considers the control to be very important in the acquisition of land for highways, and the importance derives from the benefit which the state, not the appellee personally, expects to receive from the control. No effort has been made by the Commonwealth to alleviate the harm which that control has imposed upon the appellant. His rights have been completely ignored, his property has been deliberately used for nearly four years as a state highway, the Commonwealth has not paid for the use, and it does not intend to do so.

The appellant does not make the "unpleasant suggestion" (*Cohens* v. *Virginia*, 6 Wheat. 264, 416) that the state was prompted by impure motives, which can not be imputed to the sovereign. He does not deny that the state's desire to reduce the cost of acquisitions is commendable. He does not contend, of course, that the several branches of the state government conspired to thwart the appellant's rights derived from the Constitution of the United States, but he contends that their separate acts have had that effect, as evidenced by the dangerous instrumentality entrusted by the legislature to the appellee, his willful use of it in refer-

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[48] Mecham, Outlines of Agency (3rd ed.), section 545.

[49] See page 26, *ante*.

ence to the appellant's property, the Attorney General's strategy in protecting it, the Court's acceptance of his argument without analysis, and finally the Court's decision, without analysis or discussion, upholding the statute which created the power as against the claim that it violates the Fourteenth Amendment. The appellant contends that these several acts disclose a strict and jealous regard for state policy and also a conscious and shocking disregard of federal rights which clash with that policy.[50] In the face of this showing, a denial of compensation for the rental value of the property for highway purposes on grounds of sovereign immunity "runs counter to modern democratic notions of the moral responsibility of the State."[51]

As stated in *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299, 304, just compensation "rests on equitable principles." The use there was not illegal, but it seems reasonable to interpret that expression as meaning that all compensation measured by equitable principles is included in just compensation. If the appellant had used the property of the state illegally and willfully, he would have had to pay for it in accordance with the rules governing willful trespass.[52] It would not be equitable to deny the owner a similar remedy when the state is the trespasser. To allow the state to mask behind the doctrine of sovereign immunity would be placing the emphasis upon common law principles. The realistic view is that "in equitable matters, in the absence of some statutory or constitutional provision to the contrary, the general principles of equity should be applied to actions brought by the state as well as by a private party" in order to prevent "unjust enrichment."[53]

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[50] See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264; *Poindexter* v. *Greenhow*, 114 U. S. 270.

[51] *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 59 (dissent).

[52] *Union Nav. Stores Co.* v. *U. S.*, 240 U. S. 284.

[53] *State* v. *Martin*, 59 Ariz. 438, 447; *Page* v. *City of Prescott*, 59 Ariz. 497.

The principles upon which the due process clause is founded are not less equitable than those supporting the right to just compensation. If the Fourteenth Amendment imposes the duty to pay the fair rental value of the illegal use of the land for a highway, a promise to pay that rental value is implied. The compensation based upon that duty and implied promise is a part of the just compensation to which the appellant is entitled.[54]

In *Carter* v. *Town of Pearisburg*, 173 Va. 346, compensation was not measured by the use to which the owner devoted the land. It does not appear that the land or the springs had a market value based upon the use of the water and the use of the land for a pipe line. Apparently the needs of the town afforded the only opportunity for the use of the water in great quantity, just as the needs of the state constituted the only opportunity for the use of the appellant's property as an important highway. The owner was allowed a "fair rental" not only for the use of the water but also for the use of the pipe line which the town had constructed at its own expense. The allowance was not based upon his demand of $50 a month. It was granted because a denial of a "fair rental" for the town's purposes would have deprived the owner of the property "without due process of law", and would have been a taking for public use "without just compensation." (173 Va. 346, 350) The demand for payment simply showed the willful character of the trespass because the town ignored the demand and continued to use the water and the pipe line without paying for it. If the owner had protested against the use of the pipe line and the water, without mentioning the amount he expected to get for the use, his right to a "fair rental" would have been the same.

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[54] *Jacobs* v. *U. S.*, 290 U. S. 13, 16.

The recovery in *Carter v. Town of Pearisburg*, 173 Va. 346, was accomplished in an action for possession brought by the owner, but since the Court recognized that the owner's right to a fair rental was founded upon the securities of due process and just compensation it is inconceivable that the owner would have been denied compensation for the rental value if he had protested and waited to present his claim in the condemnation proceedings brought by the town. If the State Highway Commissioner of Virginia had constructed and used the pipe line in defiance of the owner's protest, the owner would have been compelled to present his claim in condemnation proceedings.[55]

If the Court concludes that compensation for the fair rental value of the appellant's property for highway purposes is not a question of just compensation envisaged by the Fourteenth Amendment, but is one of state liability for a willful tort of its agent, and is unwilling to recognize that liability in this case either because of the belief that the tort was not authorized by the state expressly or by implication, or because the state is not liable even if it did authorize it, or accepted the benefits derived from it, unless it consents to be liable, or if the Court concludes that while it is a question of just compensation the denial of the claim was not "gross and obvious, coming close to the boundary of arbitrary action,"[56] still the question concerning the validity of the statute assailed will not become moot because if the statute is invalid the use is illegal

[55] *Wilson* v. *State Highway Com'r.*, 174 Va. 82, 93; *Hicks* v. *Anderson*, 182 Va. 195, 199. The statement in *Searl* v. *School District No. 2, etc.*, 133 U. S. 553, 565, to the effect that the claim for compensation for the use of the property should not be presented in the condemnation proceedings, is not controlling because *Carter* v. *Town of Pearisburg, supra*, recognizes that the claim is for just compensation, and the dictum in the *Searl* case does not mean that a claim for just compensation can not be presented in the condemnation proceedings.

[56] *Roberts* v. *New York*, 295 U. S. 264, 277.

for lack of authority, and the decision in *Carter* v. *Town of Pearisburg* (*supra*) is controlling and sufficient for the recovery of the rental value of the use for state purposes. The appellant needs primarily a decision that the statute assailed contravenes the Fourteenth Amendment of the Constitution of the United States and furnished no legal justification for the use of the property, and that the appellant is not prevented by any rule of justice from claiming compensation for the use. The appellant will then be allowed, under the decisions of the Supreme Court of Appeals of Virginia, to recover just compensation for the rental value of the use for highway purposes,[57] and to present his claim therefor in the condemnation proceedings brought by the state.[58]

5. *Doctrine of void ab initio*

The appellant relies upon the principle that an unconstitutional statute is void ab initio, as decided in *Norton* v. *Shelby County*, 118 U. S. 425, and enunciated in the familiar words (p. 442) of the Court: "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed." While this statement was reviewed with a critical eye in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374, the appellant contends that the principle of res judicata was controlling there, and that the doctrine of void ab initio was not repudiated or impaired. It is not contended that every act based upon an unconstitutional statute is without legal support, but it is contended that the unconstitutional statute does not furnish any support

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[57] *Carter* v. *Town of Pearisburg*, *supra*.

[58] *Wilson* v. *State Highway Com'r.*, *supra*.

and that the support, if any, is derived from some distinct rule of justice.

The appellant contends that the rule that an unconstitutional statute is void ab initio is a corollary of the American doctrine that the determination of the constitutional validity of a statute is a judicial function, not a legislative prerogative. To be valid until declared by the Court to be invalid, an unconstitutional statute must draw its temporary validity from a concurrent legislative power to determine constitutional validity. In this country the power authoritatively to determine whether a statute is constitutional has never been considered to be a concurrent power exercised initially by the enacting body and finally by the judiciary.[59] The controversy over the control of constitutional construction has been between the contenders for judicial supremacy and the contenders for legislative supremacy, with no middle ground.[60] That an unconstitutional statute may escape invalidation[61] indicates an infirmity in the judicial process by which constitutional validity is determined, but

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[59] Compare the early practice in New York, Pennsylvania, and Vermont where legislative construction was reviewed by Council, without absolute control. Haines, The American Doctrine of Judicial Supremacy (1932), pp. 73-87. A similar plan was proposed by Jefferson for Virginia (ibid., p. 87) and by Randolph and Madison for the national government (ibid., pp. 127-131).

[60] *Marbury* v. *Madison*, 1 Cranch 137, 177, 178, 179; *Loan Association* v. *Topeka*, 87 U. S. (20 Wall.) 655, 663, 664, 665; *U. S.* v. *Reese*, 92 U. S. 214, 221; *Munn* v. *Illinois*, 94 U. S. 113, 132, 133; *Granger Cases*, 94 U. S. 155, 164; *Gordon* v. *U. S.*, 117 U. S. 697; *Chicago, M. & St. P. R. Co.* v. *Minn.*, 134 U. S. 418, 459-466; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 554; *Atkins* v. *Kansas*, 191 U. S. 207, 223; *Lochner* v. *New York*, 198 U. S. 45, 57, 70, 72, 73, 75, 76; *Employers' Liability Cases*, 207 U. S. 463, 509, 510, 511, 537 (dissent); *Hammer* v. *Dagenhart*, 247 U. S. 251, 280 (dissent); *Burns Baking Co.* v. *Bryan*, 264 U. S. 465, 533, 534 (dissent); *Tyson and Brother* v. *Banton*, 273 U. S. 418, 445, 446, 454 (dissents); *Baldwin* v. *Missouri*, 281 U. S. 586, 595 (dissent); *Fed. Power Com.* v. *Nat. Gas Pipeline Co.*, 315 U. S. 575, 600, 601 (dissents).

[61] See note on "Unconstitutional legislation in the States of America," Journal Comp. Leg. & Int. Law (Nov. 1944), 26:74.

it is not proof of a concurrent legislative power to determine constitutional validity. When presented for judicial review a statute may withstand an attack because the Court finds it unnecessary to determine the validity of the statute, or indulges in the presumption of validity, or construes the statute so as to sustain it, or yields to the legislative determination of conditions justifying the enactment, but the Court never yields to a legislative determination of the constitutional validity of a statute that is declared by the Court to be unconstitutional.

An unconstitutional statute has always been considered to be void,[62] and since the doctrine of judicial supremacy excludes legislative control of constitutional construction the term "void" must signify invalidity from the date of enactment. In *Minge* v. *Gilman*, Fed. Cases, No. 9631, Mr. Justice Iredell stated that the constitution is "unrepealable and uncontrollable" by the legislature, that an unconstitutional statute is "totally void," and that the courts must declare it to be void "because passed without any authority whatever." (17 Fed. Cases 440, 442, 444). In *Whittington* v. *Polk*, 1 H. & J. (Md.) 236, Chief Justice Chase said that it was the function of the Court to determine whether a statute, "which assumes the appearance of law, and is clothed with the garb of authority," is constitutional; and that if unconstitutional "it is not the law, and cannot influence the judgment of the Court in the decision of the

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[62] Haines, American Doctrine of Judicial Supremacy (1932), pp. 33, 50, 51-63, 95-98, 105-120, 135-143, 148-, 93, giving the views of Coke, Otis, Mason, Varnum, Iredell, Marshall, Wilson, Ellsworth, Hamilton and others. See also *Minge* v. *Gilman*, Fed. Cases No. 9631; *Whittington* v. *Polk*, 1 H. & J. (Md.) 236; *Ogden* v. *Witherspoon*, Fed. Cases No. 10,461; *Marbury* v. *Madison*, 1 Cranch 127, 179; *Loan Assoc.* v. *Topeka*, 87 U. S. 655, 663; *Munn* v. *Illinois*, 94 U. S. 113, 132; *Poindexter* v. *Greenhow*, 114 U. S. 270, 295, 305; *Gordon* v. *U. S.*, 117 U. S. 697, 705; *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S. 429, 554, *Employers' Liability Cases*, 207 U. S. 463, 509 (dissent); *Ex parte Young*, 209 U. S. 123, 159; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 91.

question before them." (pp. 242, 244) In *Ogden* v. *Witherspoon*, Fed. Cases No. 10,461, Chief Justice Marshall stated that a legislative determination that an act had not been repealed was made "by a branch of government, not authorized by the constitution to make it, and is therefore, in my judgment, void." (18 Fed. Cases 618, 619) In *Marbury* v. *Madison*, 1 Cranch. 137, when the Chief Justice used the words "entirely void" (p. 177) he must have meant invalidity from the date of enactment because of the absence of legislative authority to put a binding construction upon the constitution. Since the terms "void" and "voidable" are opposite in meaning,[63] it is not reasonable to say that when a statute is termed "void" the meaning is that it is voidable. Occasionally "void" is intended to mean "voidable", where invalidity must be established by showing the absence of particular facts,[64] but in *Marbury* v. *Madison* the statute was held invalid because of the absence of power.

While an unconstitutional statute may escape judicial review until it injures someone who is able and willing to assail it, the assailant can not escape the rules of justice which confront him in a lawsuit. Constitutional questions do not displace the rules by which litigated issues are resolved. In deciding whether to protect or to expose acts done under an unconstitutional statute, the Court is guided by "those flexible considerations of equity which are established sources for judicial law-making,"[65] and which are not related necessarily to the constitutional grounds upon which the statute is assailed. In striking down an unconstitutional statute, the Court exposes the acts done under it because they are not supported by equitable principles. An uncon-

[63] *Toy Toy* v. *Hopkins*, 212 U. S. 542.

[64] *Chicago, M. & St. P. R. Co.* v. *Minn.*, 134 U. S. 418; *At. C. L. R. Co.* v. *Florida*, 295 U. S. 301; *U. S.* v. *Morgan*, 307 U. S. 183.

[65] *Jackson County* v. *United States*, 308 U. S. 343, 350.

stitutional statute is not an operative rule [66] for the protection of action taken under it, but as an "operative fact" [67] it may precipitate action protected by a rule of justice. Analogous disposition is made of an assignee who, because of the infirmity of the assignor's title, is not protected by the assignment but must turn for protection to the rule of estoppel.[68]

In *Norton* v. *Shelby County, supra*, the bond issue based upon the unconstitutional statute had no legal support because none could be drawn from any rule of justice. The Court stated that the circumstances pointed to a rule of justice to support a rescission of the bond transaction presented in the suit if the county still held the railroad stock received in payment for the bonds. (118 U. S. 425, 454) Having recognized that the effect of invalidity is governed by rules of justice derived from the facts of the case, it is reasonable to conclude that the Court would have upheld the bond issue if the facts had developed a rule of justice to support it.

In the case of *Chicot County Drainage District* v. *Baxter State Bank, supra*, the adjustment of the bonded debt, under the provisions of the statute later declared unconstitutional, was upheld because it was supported by a rule of justice derived from the fact that the bondholder allowed the adjustment to be perfected without seizing the opportunity he had to challenge the validity of the statute. Since the Court recognized that the effect of invalidity is governed by rules of justice derived from the facts, it is

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[66] *Marbury* v. *Madison*, 1 Cranch. 137, 177.

[67] *Chicot Country Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374.

[68] *Cowdrey* v. *Vandenburgh* (opinion by Mr. Justice Field), 101 U. S. 572 (154 U. S. 659); *Looney* v. *District of Columbia*, 113 U. S. 258; *Laughlin* v. *District of Columbia*, 116 U. S. 485; *Gleason* v. *District of Columbia*, 127 U. S. 133.

reasonable to conclude that the Court would not have upheld the adjustment if the validity of the statute had been challenged at the proper time. The decision did not turn on the fact that the adjustment was made before the Court had time to pass upon the statute, which would have been decisive if the statute had been valid until declared invalid. In frowning upon "an all-inclusive statement of a principle of absolute retroactive invalidity" and turning to "consequences which cannot justly be ignored" (308 U. S. 371, 374), the Court must have meant that merely because the statute is void ab initio is no reason for disregarding equitable considerations found in acts occasioned by the statute. That the "past cannot always be erased by a new judicial declaration" (308 U. S. 371, 374) must have reference to the consequences of the statute; otherwise the doctrine would be that some statutes are void ab initio while others are not. The statute was an "operative fact" (308 U. S. 371, 374) in furnishing the color for the adjustment, but the adjustment was upheld because it received "the blessing of res judicata."[69] That the circumstances and not the statute furnish the basis for determining the effect of invalidity is clearly shown by the Court's reference to "the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions." (308 U. S. 371, 375) (If the statute is not void ab initio there

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[69] *Warring* v. *Colpoys*, 122 F. (2) 642, 646; cert. den., 314 U. S. 678. To the same effect, see *May* v. *Maricopa Co. M. W. C. Dist.*, 112 P. (2) (Ariz.) 204, 205; *Dodge* v. *Detroit Trust Co.*, 300 Mich. 575, 2 N. W. (2) 509, 522, 523; *Weiner* v. *Wittman*, 27 A. (2) (N. J.) 866, 867; *Rigby* v. *Great A. & P. T. Co.*, 344 Pa. 242, 25 A. (2) 401, 404, 405; *Hartman* v. *H. O. L. C.*, 7 N. W. (2) (S. D.) 720, 721; *Miller* v. *Wis. Dept. of Tax.*, 241 Wis. 145, 5 N. W. (2) 749; 750 (318 U. S. 782). Even res judicata is insufficient as a rule of justice to prevent habeas corpus where the correction is made by simply allowing the prisoner to leave the jail. *Ex parte Baer*, 20 F. (2) 912; cf. *Tari* v. *State*, 159 N. E. (Oh. St.) 594, 599; *Stephenson* v. *State*, 119 Oh. St. 349, 164 N. E. 59.

is no occasion for considering the consequences of a ruling against validity in relation to "past transactions." No support is perceived for the view that the decision marks "the Supreme Court's express repudiation of the theory that an unconstitutional statute is a nullity which can confer no rights."[70] The Court did not depart from *Metzger Motor Car Co.* v. *John W. Parrott*, 233 U. S. 36, 42, where it was stated that the effect of the state court's decision was that "ab initio the statute was void," that there were no consequences in the form of "rights acquired under contract in the light of a settled rule of state interpretation of a state law or Constitution," and that there was "no foundation whatever for upholding assumed rights which can alone rest upon the existence of a state statute when the state court of last resort has held there is no valid statute to sustain them." That case shows tha he doctrine of void ab initio and the rules of justice go along together, and that while the rules may be different because of the facts the doctrine remains the same.

It is inaccurate to say that courts in states recognizing the doctrine "have not hesitated to relax the rule or make exceptions to it when its application would work an injustice to the public or to innocent third persons."[71] Actually these courts have not relaxed the rule or made exceptions to it, but they have applied the rules of justice to the facts of the case.[72]

In several tax cases the courts have intimated that the decision in the *Chicot County Drainage District* case im-

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[70] 49 Yaw Journal 959, 962. In *Armbruster* v. *City of Middletown*, 58 N. E. (2) (Ohio App.) 778, 784 (app. dismissed, 58 N. E. (2) 784), the Chicot decision was viewed as a refusal to follow "to its coldly logical conclusion" the "sweeping language" in the Norton decision, but the Court obviously was influenced by the fact that the question of invalidity was not raised at the outset.

[71] 99 A. L. R. 304.

[72] Cf. *U. S.* v. *U. S. F. & G. Co.*, 309 U. S. 506, 514.

paired the doctrine of void ab initio. Actually the decision was the reason for protecting the taxpayer on some equitable ground of hardship or compulsion rather than as the reason for treating the invalid tax statute as valid until declared invalid.[73]

6. *Application of the rules of justice*

In *Nichols* v. *City of Cleveland*, 247 Fed. 731, where city officials, holding office under an unconstitutional statute, used private property for a public purpose, the Court said: "It would be a strange, and certainly an arbitrary rule that would forbid an owner to protect his property rights through challenge of the constitutional validity of the only statute relied on to justify the exercise of such a power as that of eminent domain." (p. 739)

There is no rule of justice that allows the sovereign to avoid payment for the use of the property taken under an unconstitutional statute by simply paying the amount of the value of the property taken. In this respect there is no difference between a municipality and a private corporation having the power of eminent domain (*ibid.*, 247 F. 734, 740), and if a municipality must pay for the use no reason is perceived for exempting the state. The traditional immunity of the sovereign is inapposite, since payment for the use is a part of the just compensaton.[74]

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[73] *J. A. Daugherty, etc.* v. *Com'r of Int. Rev.*, 121 F. (2) 700; *Davies' Estate* v. *Com'r of Int. Rev.*, 126 F. (2) 294 (cert. den., 317 U. S. 640); *Com'r of Int. Rev.* v. *Security Flour Mills Co.*, 135 F. (2) 165, 169 (dissent) (aff., 321 U. S. 281). Cf. *Athens Roller Mills* v. *Com'r of Int. Rev.*, 136 F. (2) 125; *Moore* v. *Goodyear Tire & Rubber Co.*, 141 F. (2) 328, 331. As indicated in *Ben Bimberg Co., Inc.* v. *Helvering*, 126 F. (2) 412 (cert. den., 317 U. S. 641), the Daugherty decision did not "genarally" contradict the power of the Commissioner to cancel the taxpayer's deduction because the statute was void ab initio. That is true also in the other cases.

[74] See *Carter* v. *Town of Pearisburg*, 173 Va. 346.

The appellee is in no position to claim a benefit through possession taken and use made "on the faith of any settled rule of decision" as to the validity of the statute assailed (*ibid.*, 247 F. 731, 741), or through any failure of the appellant to act. At no time has the appellant led the appellee to believe that there was no illegality in what the appellee was doing. He was warned of the illegality of his acts by the appellant and also by the decisions in West Virginia disapproving a similar statute which formed the pattern for the statute assailed.[75]

From the very beginning of the appellee's use of the property for the state, the appellant has actively contested the validity of the statute and the use of the property; and the appellee continued to use the property for the state "in spite of the continued pendency of the litigation, and so was legally chargeable with the peril" of having the use declared to be illegal "because of the constitutional infirmity of the statute." (*Ibid.*, 247 F. 731, 741, 742.)

The appellant has never given the appellee any cause to believe that the appellant was willing for the property to be used by the state free of charge. When the appellee filed the condemnation proceedings just as the Supreme Court of Appeals of Virginia was about to pass upon the statute upon which the use was based, the postponement of the proceedings by consent had no reference to the use of the property; and from that consent it can not be implied that the appellant was willing for the property to be used by the state free of charge.

When the appellant's attack on the statute was frustrated by the filing of the condemnation proceedings, and after the Court decided that the appellant had a "prompt remedy" (182 Va. 70, 75), the appellant made a timely attack on the

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[75] *McGibson* v. *Roane County Court*, 95 W. Va., 338; *Simms* v. *Dillon*, 119 W. Va. 284. Aside from these stop signals, appellee was sufficiently warned by the views expressed in *Bragg* v. *Weaver*, 251 U. S. 57.

statute on a different ground, growing out of the disfigurement of the property. Since this ground of attack was not available to the appellant until the appellee had filed the condemnation proceedings after disfiguring the property, the principle of res judicata, enunciated in the *Chicot County Drainage District* case (308 U. S. 371) is not available to the appellee to justify the use of the property free of charge. This is not a case in which the claimant could have attacked on the ground that an injury was imminent or threatened. The injury from the unconstitutional feature of the statute is not attributable to the disfigurement of the property alone, but derives from the filing of condemnation proceedings after the disfigurement. If the equity suit had not been filed the appellant would have been entitled to attack the statute in the condemnation proceedings on the ground that the appellee waited until he disfigured the property before he filed the proceedings. The filing of the equity suit did not operate to advance the time for making this attack on the statute. It would be absurd to preclude the appellant upon the ground that he should have sought mandamus to compel the appellee to file the proceedings before the disfigurement, in the face of the plain provision of the statute that the appellee is under no duty to file the proceedings until after he completes the highway and sixty days thereafter.[76]

This case is entirely different from *King* v. *Philadelphia County*, 154 Pa. St. 160, where the improvements were made and used for several years before the owner made any objection, and when he did object he wanted the improvements to be torn up and removed. The officials in that case had no warning of any legal objections to what they did.

The fact that for approximately a quarter of a century

[76] *Smith* v. *Cahoon*, 283 U. S. 553.

in Virginia various statutes have been used as the ground for the uncompensated use of private property for state highways is no valid reason for precluding the appellant on the ground of "public policy in the light of the nature both of the statute and of its previous application."[77] Those who have failed to attack the statute before their titles were divested are not now in a position to attack the statute, or to claim compensation for the use of their properties, but that has no bearing upon the appellant's right to attack the statute or upon the duty of the state to pay for the use of the appellant's property.

7. Use under an unconstitutional statute

The use of private property for a public purpose before acquiring the legal title and without lawful authority is prohibited by due process.[78] The authority to use the property may be conferred upon a state official by a valid statute or court order, but a state official does not have that authority merely because the state has conferred upon him the power to acquire the legal title by eminent domain.[79] Since the statute, upon which the appellee based the taking, mutilation and use of the appellant's property before acquiring the appellant's title, is unconstitutional, and void ab initio, the appellee had only the power to acquire the legal title by eminent domain, and the use of the property for state highway purposes has been and still is without

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[77] *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374.

[78] *Carter* v. *Town of Pearisburg*, 173 Va. 346, 350; *Hustead* v. *Barron*, 75 Fed. (2) 169, 170.

[79] *Litchfield* v. *Bond*, 186 N. Y. 66. Even where the use is authorized by a valid statute, if the property is taken and used without strict compliance with the statutory requirements the taking and use are unlawful. *Cherokee Nation* v. *So. Kan. R. Co.*, 135 U. S. 641, 661.

lawful authority,[80] and in violation of the due process clause of the Fourteenth Amendment.

8. *Question of severability*

The argument may be advanced that since it is not constitutionally objectionable for a statute to grant authority to mutilate, disfigure, and use private property before filing condemnation proceedings, the use of appellant's property is unobjectionable because the statute assailed contains a provision for that authority and the provision is severable from the provision authorizing the appellee to control the filing of the proceedings. The statute does not contain a severability provision.[81] The presumption is, therefore, that the legislature intended the statute "to be effective as an entirety,"[82] and the presumption becomes conclusive if severance would violate the inducement of the statute and the intention of the legislature.[83]

The presumption that the legislature intended the statute to be effective as an entirety is made conclusive by the following provision expressing the intention of the statute: "It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto * * *" (ante p. 18). From this provision it is obvious that the legislature did not intend that the owner should have the power to compel the appellee to file condemnation proceedings during the construction of the highway, and it is plain that the reason

[80] *Hursh* v. *First Div. St. P. & P. R. Co.*, 17 Minn. 439 (17 G. 417); *Hale* v. *Lawrence*, 21 N. J. Law 714; *Nichols* v. *City of Cleveland*, 247 Fed. 731 (cert. den., 246 U. S. 668).

[81] Virginia Acts 1940, c. 380. The severability clause in the 1922 Act, C. 403, sec. 14, was dropped in the 1940 Act.

[82] *Williams* v. *Standard Oil Company*, 278 U. S. 235, 241.

[83] *Thorne* v. *Burke*, 18 N. W. (2) (Neb.) 664.

was that the legislature did not want the owner to compel the commissioners to view the property while it was being mutilated and disfigured. Yet, that is precisely what the owner would have the authority to do if the provision authorizing the seizure, mutilation, disfigurement, and use of the property should be allowed to stand alone.[84] He would have "the run of the entire bus", as the Court in *Morgan* v. *Com.*, 34 S. E. (2) (Va.) 491, 496, said of the interstate passengers, and the result would be that the statute "in its entirety would effectively be disrupted." (*Ibid.*) It is plain, therefore, that the legislature would not have enacted the statute with the unconstitutional provisions eliminated.[85]

The use of the property as a state highway is merely incidental to the "main design" of the statute, which is to prevent the owner from having the property viewed until after the highway and the alteration of the property have been completed. "That which is merely auxiliary to the main design must fall with the principal of which it is merely an incident."[86]

III. Interest on Damages Awarded for Injury to Residue

A. Question of Interest Not Submitted to Commissioners.

The claim for interest on the damages awarded was not submitted to the commissioners. Before it can be established that they included interest in the award, an affirmative showing to that effect must be made. There is nothing in their report or in any part of the record to show that they had before them any evidence bearing upon the cause of the delay in the filing and postponement of the condemnation pro-

[84] *Hicks* v. *Anderson*, 182 Va. 195.
[85] *Howard* v. *Ill. C. R. Co.*, 207 U. S. 463, 501.
[86] *Poindexter* v. *Greenhow*, 114 U. S. 270, 304.

ceedings.[87] The award simply recited "there was $6,500.00 damages resulting to the adjacent or other property of the owner from the construction and operation of said highway." (R. 29)

B. Fundamental Right Guaranteed by the Fourteenth Amendment

1. *Right to just compensation*

In the law of eminent domain the right to just compensation derives from fundamental principles of liberty and justice by which the ownership and use of private property are protected.[88] To say that the right depends upon a specific mandate is to imply that free government does not exist. The specific mandate is merely the positive expression of the existing fundamental right,[89] which is guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States.[90]

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[87] *Minn.* v. *Wilkin*, 30 Minn. 145, 15 N. W. 668. The case of *Bridgeman* v. *Hardwick*, 67 Vt. 653, 32 A. 502, is distinguishable, because there the award recited that the owner was entitled to "recover" a certain amount.

[88] *Fletcher* v. *Peck*, 6 Cranch. 87, 135, 139; *Garrison* v. *New York*, 21 Wall. 196, 203, 204; *Cairo, etc., R. Co.* v. *Turner*, 31 Ark. 494, 499; *Chicago, B. & Q. R. Co.* v. *P. U. Com.*, 69 Colo. 275, 277; *Bristol* v. *New Chester*, 3 N. H. 524; *Orr* v. *Quimby*, 54 N. H. 590; In re *Bergen, etc., Counties*, 22 N. J. L. 293; *People* v. *Priest*, 206 N. Y. 274; *City of Raleigh* v. *Hatcher*, 220 N. C. 613; *Hyde* v. *Minn., etc., R. Co.*, 29 S. D. 220, 229; *Noble* v. *Martin*, 191 Wash. 39.

[89] *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 324, 325. "The framers of the federal Constitution did not even think it necessary to place therein any guaranty of this right to recover damages, thus showing that this right was fully recognized." *Hyde* v. *Minn.*, *supra*.

[90] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234-241; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565; *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 582, 592-594; *Appleby* v. *Buffalo*, 221 U. S. 524, 530-532; *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.*, 228 U. S. 326, 330; *McGovern* v. *New York*, 229 U. S. 363, 370; *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363, 365;

Fundamental justice is the vital ingredient of both the due process clause, which includes all deprivations in the public interest, and the compensation mandate, which confines the protection to property taken for a public use. Compensation required by the former is more comprehensive than that required by the latter, but all compensation required by the latter is required by the former because all compensation required by the compensation provision derives from fundamental justice and all compensation drawn from that source is required by due process.[91]

2. *Right to damages for injuries*

Compensation for certain undefined injuries, where no part of the property is taken for public use, is required by the fundamental principles of justice embodied in due process,[92] and by the "spirit" of the compensation mandate.[93]

Since damage to property where no part is taken is compensable under due process because of fundamental justice,

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Producers Transp. Co. v. *R. R. Com.*, 251 U. S. 228, 230, 231; *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, 413, 415, 416; *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 191, 193, 194, 195, 197; *Dohaney* v. *Rogers*, 281 U. S. 362, 366; *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613, 618; *Roberts* v. *New York*, 295 U. S. 264.

[91] Fundamental rights protected by the first eight amendments are protected by the Fourteenth, not because they are enumerated but because they are fundamental. *Twining* v. *New Jersey*, 211 U. S. 78; *Powell* v. *Alabama*, 287 U. S. 45; *Palko* v. *Conn.*, 302 U. S. 319; *Betts* v. *Brady*, 316 U. S. 455.

[92] *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 331-334; *Hopkins* v. *Clemson Agri. College*, 221 U. S. 636, 646-648; *McCoy* v. *Union Elevated R. Co.*, *supra*; *Penn. Coal Co.* v. *Mahon*, *supra*; *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, *supra*.

[93] *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 551-554, 557. Cf. *Sharp* v. *U. S.*, 191 U. S. 341, 353-356; *U. S.* v. *Welch*, 217 U. S. 333, 338, 339; *Campbell* v. *U. S.*, 266 U. S. 368, 371; *U. S.* v. *Miller*, 317 U. S. 369, 375, 376.

there is no valid ground for contending that due process does not guarantee compensation for damage to the residue where a part of the property is taken. Compensation for damage to the residue is required by the compensation mandate,[94] but the damages and benefits to the residue are also assessed upon "general principles" and "with due regard to right and justice,"[95] and a denial of compensation for damage to the residue would be a "travesty upon justice."[96] That compensation for injury to the residue derives from fundamental justice, and not from the circumstance that the claim is made under the compensation mandate rather than under due process, is illustrated by the distinction between the case in which compensation for special damage to the residue is allowed and that in which compensation for damage of a general character is denied.

3. *Right to interest on damages*

If damage to the residue is compensable under due process, there is no valid ground for contending that interest on the damages awarded is not compensable under due process. Payment of interest is not expressly required by the compensation mandate of the Fifth Amendment, and yet in *Jacobs* v. *U. S.*, 290 U. S. 13, payment was required.[97] Under the Fourteenth, as well as under the Fifth Amendment, interest on the damages must be paid as a matter of

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[94] *Bauman* v. *Ross*, 167 U. S. 548, 574, 575, 584; *Sharp* v. *U. S.*, 191 U. S. 341, 354, 355; *Campbell* v. *U. S.*, 266 U. S. 368, 371; *U. S.* v. *Miller*, 317 U. S. 369, 375, 376.

[95] *Pottawatomie Com'rs* v. *O'Sullivan*, 17 Kan. 58, 60; *Bauman* v. *Ross*, 167 U. S. 548, 581, 582.

[96] *U. S.* v. *Grizzard*, 219 U. S. 180, 185, 186.

[97] In the case of *In re Bronx River Parkway, etc.*, 284 N. Y. 48, 29 N. E. (2) 465, 468 (aff., 313 U. S. 540), in which *Jacobs* v. *U. S.* was discussed, the Court said that interest must be paid "so that the compensation may be just." In Lewis on Eminent Domain (3rd ed.), vol. 2, sec. 742, the author states that the payment of interest is "just to the owner."

fundamental justice, not because of particular terminology. To say that interest is required under the Fifth Amendment because of the term "just", but not required under the Fourteenth Amendment because of the absence of that term—"to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them."[98] The term "just" in the Fifth Amendment is superfluous,[99] and it is incapable of supporting a substantial distinction between the two securities. In the *Grizzard* case (219 U. S. 180) and the *Jacobs* case (290 U. S. 13), undoubtedly the same result would have been reached had the claims been made under the due process clause of the Fifth Amendment. Due process of the Fifth is no stronger than due process of the Fourteenth Amendment,[100] and "there is certainly a very broad correlation in coverage."[101]

The fundamental character of the right to interest on the amount awarded in condemnation proceedings from the date of entry on the land is disclosed by the decisions of the state courts. In forty states it has been decided that payment of interest on the award from date of entry on the land is a constitutional requirement, with no indication of any distinction between interest on the damages awarded for injuries to the residue and interest on the amount awarded for the land taken, and in eighteen of these states the decisions included interest on the damages awarded for injuries to the residue.[102] In six of these forty states the courts

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[98] *Snyder* v. *Mass.*, 291 U. S. 97, 122.

[99] *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 326; see also *State, etc.*, v. *Merrell*, 127 Ohio State 453, 189 N. E. 116; *Simms* v. *Dillon*, 119 W. Va. 284.

[100] *Twining* v. *New Jersey*, 211 U. S. 78, 101.

[101] *Screws* v. *U. S.*, 89 L. Ed. 1029, 1048.

[102] *South. R. Co.* v. *Cowan*, 129 Ala. 577 (interest on damages), also *South. R. Co.* v. *Clark*, 220 Ala. 555; *Donaghey* v. *Lincoln*, 171 Ark. 1042 (interest on damages); *Metropolitan Water Dist., etc.* v. *Adams*, 16 Cal. (2) 676; *Town of Stamford* v. *Vicono*, 108 Conn. 359 (interest on damages); *Selma, R. & D. R. Co.* v. *Rederine*, 51 Ga. 470; *Boise Valley*

have held that just compensation is required by fundamental justice.[103] In four states interest is allowed by statute,[104] and in one state bond is required in an amount approved by

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Con. Co. v. *Kröeger*, 17 Idaho 384 (interest on damages); *Moll* v. *Sanitary Dist.*, 228 Ill. 633; *Schnull* v. *Ind. U. R. Co.*, 190 Ind. 572 (interest on damages); *Weldon* v. *Iowa St. High. Com.*, 211 Iowa 625 (interest on damages); *Fleming* v. *Board of Com'rs., etc.*, 119 Kan. 598 (interest on damages); *Com. ex-rel.* v. *H. Com.* v. *Adams*, 220 Ky. 151, also 224 Ky. 556; *Shreveport & A. R. Co.* v. *Hollingsworth*, 42 La. Ann. 749 (interest on damages, but not until amount ascertained); *Bangor & P. R. Co.* v. *McComb*, 60 Me. 290 (interest on damages); *Norris* v. *Baltimore*, 44 Md. 598; *Imbescheid* v. *Old Colony R. Co.*, 171 Mass. 209 (interest on damages); *Compau* v. *City of Detroit*, 223 Mich. 519; *Minn.* v. *Wilkin*, 30 Minn. 145; *Williams* v. *New Orleans, M. & T. R. Co.*, 60 Miss. 689; *Miller* v. *St. Louis & K. C. R. Co.*, 162 Mo. 424; *Butte Elec. R. Co.* v. *Mathews*, 34 Mont. 487; *Langdon* v. *Loup River P. P. Dist.*, 13 N. W. (2) (Neb.) 168 (interest on damages); *Goodrich Falls Elec. Co.* v. *Howard*, 171 A. (N. H.) 761; *Duncan Hood Corp.* v. *City of Summit*, 105 N. J. L. 583 (interest on damages from date of ordinance, construed as date of taking); *Atchison, T. & S. F. R. Co.* v. *Richter*, 20 N. M. 278; *In re Bronx River Parkway, etc.*, 284 N. Y. 48 (313 U. S. 540), also *In re West 151 St., etc.*, 222 N. Y. 370; *Abernathy* v. *S. & W. R. Co.*, 159 N. C. 340 (interest on damages, semble); *Donaldson* v. *City of Bismarck*, 71 N. D. 592 (interest on damages); *State, etc.* v. *Merrell*, 127 Oh. St. 453; *Okla. City* v. *Wells*, 91 P. (2) (Okla.) 1077; *Whitcomb* v. *City of Philadelphia*, 264 Pa. 277; *So. New Eng. R. Co.* v. *Shuttleworth*, 38 R. I. 216; *Haig* v. *Waterce Power Co.*, 119 S. C. 319; *Alloway* v. *City of Nashville*, 88 Tenn. 510 (interest on damages); *State* v. *Hale*, 136 Texas 29 (interest on damages); *Salt Lake & U. R. Co.* v. *Schramm*, 56 Utah 53; *Bridgeman* v. *Hardwick*, 67 Vt. 653 (interest on damages); *Attorney General* v. *Turpin*, 3 H. & M. 548, also see *City of Richmond* v. *Goodwyn*, 132 Va. 442; *Bellingham Bay & B. C. R. Co.* v. *Strand*, 14 Wash. 144; *Appleton Waterworks Co.* v. *R. R. Com.*, 154 Wis. 121; *Simms* v. *Dillon*, 119 W. Va. 284 (interest on damages, semble).

[103] *Cairo, etc., R. Co.* v. *Turner*, 31 Ark. 494, 499, and *Donaghey* v. *Lonsdale*, 171 Ark. 1042; *Orr* v. *Quimby*, 54 N. H. 590, and *Goodrich Falls Elec. Co.* v. *Howard*, 171 A. (N. H.) 761; *In re Bergen, etc., Counties*, 22 N. J. L. 293, and *Duncan Hood Corp.* v. *City of Summit*, 105 N. J. L. 583; *People* v. *Priest*, 206 N. Y. 274, and *In re Bronx River Parkway, etc.*, 284 N. Y. 48 (313 U. S. 540); *City of Raleigh* v. *Hatcher*, 220 N. C. 613, and *Abernathy* v. *S. & W. R. Co.*, 159 N. C. 340; *Noble* v. *Martin*, 191 Wash. 39, and *Bellingham Bay & B. C. R. Co.* v. *Strand*, 14 Wash. 144.

[104] Arizona Ann. Code 1939, sections 27-916, 27-1016; Florida Statutes Ann., section 74.06 (interest allowed as "a part of the just compensation awarded"); Nevada Comp. Laws 1929, sec. 6197.36; see also sections 9162 and 9169; Oregon Comp. Laws, section 12-404; cf. sections 12-302, 12-310, and 12-317.

the court for the payment of the "condemnation money, compensation and costs." [105] In the three remaining states, apparently possession is not allowed prior to the award.[106] No state fails to recognize interest as an essential part of "just" compensation; and it is safe to say that no state would deny interest on the ground that while it is "just" to pay it, non-payment is not repugnant to due process.

In the early case of *Attorney General* v. *Turpin*, 3 H. & M. 548, the Supreme Court of Appeals of Virginia held that the owner was entitled to interest for delay not caused by "his own default or neglect" (3 H. & M. 548, 564). The right to interest was upheld even though the legislature had not authorized the payment of interest. In *City of Richmond* v. *Goodwyn*, 132 Va. 442, it does not appear that possession had been taken, but the Court recognized that the right to interest is a constitutional right derived from "the duty and obligation to make just compensation," and that "Whatever is an essential element in that compensation cannot be excluded, even by legislative enactment" (132 Va. 442, 447), and the Court cited *Attorney General* v. *Turpin*, *U. S.* v. *Rogers*, 257 Fed. 397, *Alloway* v. *Nashville*, 88 Tenn. 510, and *Appleton, etc.* v. *R. Com.*, 154 Wis. 121, in which the right to interest from the time of taking possession was clearly recognized.

4. *Arbitrary denial of fundamental right*

The right to interest is not an absolute right, but it is not less fundamental because it depends upon "the totality of facts in a given case." [107] The owner is obviously not entitled to interest if he compels the public official to delay the pay-

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[105] Wyoming Rev. Stats. 1931, sections 38-226, 38-227, 38-411, 38-412.

[106] Colorado Statutes Ann. 1935, c. 61, sections 6, 11, and 14; Delaware Rev. Code 1935, section 1676; South Dakota Code 1939, sections 37.4001, 37.4012.

[107] *Betts* v. *Brady*, 316 U. S. 455, 462.

ment of compensation, or if he agrees to allow the official to withhold compensation without the payment of interest. But in the absence of compulsion by the owner, or agreement by him, he is entitled to be compensated by the payment of interest during the time of the delay. The owner's expression of an opinion conflicting with that of the public official, or even his vigorous criticism of the acts of the public official, can not operate, under a free government, to deprive him of the right to interest so long as the official is free to act.

The damage to the residue is inflicted at the time the mutilation is commenced.[108] To deny interest on the damages finally awarded would allow the government to continue to damage the residue and to have free use of the money to which the owner is entitled for the damage. Fundamental fairness demands that interest be paid, where the delay can not be prevented by the owner, even though the owner is resisting the destruction of the operation of his business, and where the public official could easily prevent and finally does prevent the injury by agreeing to preserve the operation of the business in accomplishing his public purpose. In denying interest under these circumstances, the Court "disregards those fundamental principles * * * which * * * protect the citizen in his private right, and guard him against the arbitrary action of government,"[109] and allows a free citizen to be treated as a mere puppet of a public official.

Due process of law, guaranteed by the Fourteenth Amendment, must be observed by a state court in the rulings by which compensation is determined; and while due process is not a panacea for erroneous rulings it operates against

[108] *U. S.* v. *Grizzard*, 219 U. S. 180; *Jacobs* v. *U. S.*, 290 U. S. 13.

[109] *Twining* v. *New Jersey*, 211 U. S. 78, 101.

arbitrary rulings by which fundamental rights are denied.[110]

The question in this case is not whether the amount allowed was sufficient to afford just compensation, as in the *Appleby* case, the *McGovern* case, and the *Roberts* case. No amount whatever was allowed for interest from the time the property was damaged, on October 15, 1941, until the final judgment was entered in the condemnation proceedings on August 11, 1944, a period of over thirty three months. The denial of interest was not the result of a "dubious mistake in the appraisal of the evidence" (295 U. S. 264, 278). It was the result of an arbitrary refusal to be governed by the undisputed facts relating to the delay in payment of damages, which furnishes the ground for the review of the facts to determine whether the asserted federal claim is supported by the record. [111]

The appellant seeks relief under the due process security of the Fourteenth Amendment on the ground that the denial of the fundamental right to interest on the damages awarded was "gross and obvious, coming close to the boundary of arbitrary action," [112] in that the Court, without assigning or having any reason, ignored fundamental rules of equity and fairness which were clearly indicated by the undisputed record facts. The Court ignored the right to recover interest "*ex aequo et bono*," and refused

[110] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241, 242; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557; *Appleby* v. *Buffalo*, 221 U. S. 524; *McGovern* v. *New York*, 229 U. S. 363; *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 362, 363, 365; *Roberts* v. *New York*, 295 U. S. 264, 277.

[111] *Truax* v. *Corrigan*, 257 U. S. 312, 324, 325; *Hoover & Allison Co.* v. *Evatt*, 89 L. Ed. 852, 857; *Brooklyn Sav. Bank* v. *O'Neil*, 89 L. Ed. 876, 880. For this purpose the record in *Bailey* v. *Anderson*, 182 Va. 70, is before the Court by stipulation of the parties filed October 9, 1944, in the trial court (R. 38). This record is No. 829, October Term 1943, in which certiorari was denied, 321 U. S. 769.

[112] *Roberts* v. *New York*, 295 U. S. 264, 277.

to consider rights "measured by equitable standards."[113] The Court declined to be guided by "those flexible considerations of equity which are established sources for judicial law-making,"[114] and which form the basis for the determination of just compensation.[115] The Court denied interest on the damages awarded without giving any consideration to the causes of the delay in payment, which began when the appellee seized the land, continued through the equity suit, the condemnation proceedings, and down to the present time.

C. Causes of Delay

1. Period in Which Equity Suit Was Pending

a. Issues raised and relief sought in equity suit

The bill in the equity suit was filed five days after the land was seized (R. 21, No. 829). It alleged, and by demurrer the appellee admitted, that the construction of the highway over the mill race would result in a complete breakdown of the race and a permanent stoppage of the operation of the mill by water power (R. 24, No. 829). It set forth in detail the facts bearing upon the operation of the mill and the effect of the new highway (R. 22, 23, No. 829). It alleged that the highway officials refused to make a survey of the existing highway to see what could be done to lighten up the curvature so as make it unnecessary to build the highway over the mill race (R. 26, No. 829). It did not allege that the appellant was a better judge of the location of highways than the appellee, or that the relocated highway was no better than the old one, or that

[113] *Stone* v. *White*, 301 U. S. 532, 535.

[114] *Jackson County* v. *U. S.*, 308 U. S. 343, 350.

[115] *U. S.* v. *Rogers*, 255 U. S. 163; *Seaboard Air Line R. Co.* v. *U. S.*, 261 U. S. 299, 304.

aside from the mill question the appellee abused his discretion in relocating the highway, or that the appellant would not be satisfied with the relocated highway even if the appellee would guarantee that the water would not be interrupted or would undertake to keep the pipes under the highway free from obstructions, or that the appellee had assured the appellant of all this but that the appellant refused and would continue to refuse to accept any such proposal. There is nothing whatever in the bill to indicate that the mill allegations were trivial and designed to interpose artificial obstructions to the relocation of the highway. It alleged that the mill was devoted to a public use (R. 28, No. 829), and that the appellee had no express authority to destroy the operation of the mill and no implied authority to do so because he had another acceptable way to improve the highway without disturbing the mill race (R. 28, No. 829). There is no ground for contending that the appellant's demands were unreasonable. It was sensible to preserve the operation of the mill, if practicable, and the appellee was the only one who had the power to do it. That the appellant did not succeed in convincing the Court that the mill was devoted to a public use within the rule which he sought to invoke does not prove that the appellee had no practicable means of keeping the water flowing to the mill under the new highway. All that he had to do was to say that he would attend to that, or that it was impossible for him to do so.

The bill did not allege, and the appellant did not contend that the appellee had no authority to condemn, that is, to acquire the title to the land he seized or to the land forming a part of the mill race. The bill sought to prevent obstructions in the mill race, not to obstruct the condemnation of the mill race. The appellant's contention was that the appellee had no authority to condemn the land if by doing so he would place obstructions in the mill race, but

he did not contend that aside from those obstructions the appellee had no authority to condemn the land.[116]

The bill alleged that the statute assailed violates due process in that it allows the condemnation proceedings to be postponed by the appellee for an unreasonable length of time after the property is taken (R. 27, No. 829).

The bill prayed for a permanent injunction enjoining and restraining the appellee from the unlawful construction of the highway over the land and through the mill race, and for damages caused by the excavations, fills, and other unlawful acts of the appellee in constructing the highway, and for a mandatory injunction requiring the defendant to restore the land as far as possible to its former condition; also that the statute assailed be declared unconstitutional because the time provided for is unreasonable and allows the taking of private property without due process of law (R. 29, No. 829). The bill did not pray that the appellee be restrained from filing condemnation proceedings.

b. Avoidance of issues by appellee

That the operation of the mill would be destroyed or seriously impaired by the new highway was admitted by the appellee. In his demurrer he stated that he had full power to proceed with the construction through the property, which included the mill race, and that "the bill alleges that the mill had not been in operation for some time and is not now being operated by the complainant, and is not therefore a going concern" (R. 30, No. 829). The latter allegation was inaccurate because the bill alleged "That

[116] In the appellant's pleas, filed July 9, 1943, and March 16, 1944, in the condemnation proceedings, he stated that the appellee "has no authority to condemn the land * * * for the reasons particularly set forth in the petition filed in this Court" in the equity suit, which meant that there was no authority to condemn the land if by doing so the water in the mill race would be obstructed as set forth in the bill.

on account of low water due to the present prolonged drought the mill is not operating continuously but that the mill can and will resume operations when the stream is replenished by rains" (R. 22, No. 829). The appellee's allegation was no more than a statement that he did not have to keep the water flowing to the mill because there had been no rain for some time. That the allegation was without substance is shown also by the fact that when the time came to assess the damages to the operation of the mill the appellee did not stand on the proposition that there would be no damage because the mill was not a going concern (R. 29).

The appellee alleged that by statute he had the power to determine, without judicial review, the necessity or expediency of the location of all highways in his dominion, including the location of the highway in question, and that a hearing on the question of necessity is not essential to due process in the case under the 14th Amendment. (R. 30, No. 829) The appellant did not allege or contend that a hearing was necessary.

The demurrer contained general statements of constitutional principles, none of which reached the point made in the bill, and it alleged that the appellant had not clearly shown that the statute assailed in its operation is unconstitutional as to his situation and that he had been injured by its provisions. Instead of meeting squarely the constitutional objection, the appellee contended that the appellant had no right to make the objection. (R. 30, 31, No. 829)

Certainly the appellee's allegations were not calculated to expedite the determination of the issues which the appellant sought to raise, but they did have the effect of allowing the appellee ample time to proceed with the mutilation and disfigurement of the property. Thirteen months elapsed before the Court, on November 25, 1942, reached a decision sustaining the demurrer (R. 31, No. 829).

The appellant took an appeal. The appellee waited until June 17, 1943, after the Court granted the appeal, and one year and eight months after he seized the land, before he filed condemnation proceedings (R. 36, No. 829; R. 1, No. 49). Then he agreed voluntarily to postpone the proceedings pending the appeal. (R. 36, 37, No. 829) The appellee placed himself in a strategic position to argue that the constitutional question was no longer of any great importance in the case since if the Court decided that he could destroy the operation of the mill the appellant would have the proceedings waiting for him so that the compensation could be ascertained. It is quite obvious that these artificial contentions were not intended to accelerate the consideration of the constitutional question concerning the statute.

c. Questions Decided and Questions Not Decided

The decision of the Court on the appeal in the equity suit was rendered on December 6, 1943 (R. 33, No. 829), approximately twenty-six months after the bill was filed. (R. 21, No. 829) The Court decided that the mill was not devoted to a public use within the meaning of the rule which the appellant sought to invoke (R. 35, No. 829), and that the appellee "clearly has the power to condemn the property in question." (R. 36, No. 829) Accepting the Attorney General's statement, the Court held that the appellant had no right to attack the statute since the condemnation proceedings had been instituted after the completion of the highway and had been postponed until the Court decided the mill question, and after that decision the appellant had a "prompt" remedy in the pending proceedings. (R. 37, No. 829) There is, of course, nothing in the record to show, and the appellee has never contended through the Attorney General or in any other way, that when the proceedings were postponed it was agreed that the Court on appeal in

the equity suit would pass only upon the mill question. If there had been an agreement like that, then the constitutional question would have been out of the case because of the agreement, not because the appellant had a "prompt" remedy. If the parties had come before the Court under an agreement that the attack on the statute had been abandoned because the proceedings were pending, obviously it would have been wholly gratuitous for the Court to determine whether the appellant had the right to attack the statute. The implication that the parties agreed that the Court should confine its attention to the mill question, while buttressing the conclusion that the appellant had a "prompt" remedy, is certainly not a considered adjudication that there was an agreement to that effect.

Whether the appellee could build the highway over the race and still preserve the flow of water to the mill was not before the Court. The Court said that it was alleged in the bill and "admitted" by the demurrer that the appellee in constructing the highway over the race planned to place "large" cement pipes in the race under the highway. (R. 33, No. 829). The bill made no reference to "large" pipes, but the impression given by the reference to "large" pipes may lead to the belief that the pipes could be cleaned easily by workmen standing in the pipes. The bill stated and the demurrer admitted that the plan called for "joints of cement pipe to be set in said mill race under the highway * * * for a distance of between 90 and 100 feet * * * in a bend corresponding to the existing course of the race." The Court stated that the appellant despite several conferences was unable to "impress" the highway engineers with the "gravity" of his objections to the proposed plan. (R. 34, No. 829) The bill stated and the demurrer admitted that the appellant requested the highway officials to make a survey and plat to show what might be done to lighten up the curvature of the existing road, explained to

them "the methods used in operating said grist mill and stated to them that the construction of the proposed road through the mill race and through the hill adjoining the mill race would materially and seriously impair if not stop altogether the operation of said mill for the reasons herein above stated" (R. 26, No. 829), which reasons were given in great detail in paragraph 7 of the bill (R. 24, No. 829), and stated to them that "it would be unlawful to so impair or stop the operation of the mill by the construction of the proposed road." (R. 26, No. 829) The bill states, and the demurrer admitted, that "said officials refused to grant such request and treated lightly the contentions of the complainant in regard to the operation of said mill." (*Ibid.*) Whether they were impressed with the gravity of the objections or not, it is clear that they did nothing about it.[117] If the Court had concluded that the water would flow to the mill because of the "large" pipes or because the appellee intended to keep the pipes clear as evidenced by the fact that he was not "impressed", it would have been unnecessary for the Court to discuss the law on condemnation of properties devoted to a public use (R. 34, 35, 36, No. 829). If the Court had concluded that the appellee was able to keep the pipes clear, but that he refused to do so because he was not impressed with the necessity of it in view of the fact that the mill was not a "going concern", again it would have been unnecessary for the Court to discuss the power to destroy the operation of public service enterprises. Actually the Court accepted the admitted allegations that the mill operations would be stopped by the new highway and that an acceptable highway could be constructed without

[117] Compare the statement in *Davis* v. *Com.*, 182 Va. 760, 763: "The plaintiff in error, who was carrying a number of bundles," and the comment in the dissenting opinion (182 Va. 760, 767): "As a matter of fact, she tells us that she had two bundles," and the opinion states a friend "carried for her this heavy load."

touching the race, and then ruled that still the appellee could stop the operation of the mill. Whether the appellee should keep the water flowing under the new highway, if he found it practicable to do so, was not considered by the Court in ruling that the appellee could stop the mill.

The Court decided that the appellant had no right to attack the statute because payment of compensation had not been "unreasonably delayed" (R. 37, No. 829), but the Court did not decide that the appellee did not cause the delay, or that the appellee could not have avoided the delay. The fact that by consent the proceedings were delayed to enable the Court to decide the appeal in the equity suit was the principal inducement for the ruling that the appellant had not been injured by unreasonable delay. "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right * * * to condemn. * * * Since we are of opinion * * * that such property is subject to condemnation * * * the appellant is now afforded a prompt remedy in such proceedings * * *" (R. 36, 37, No. 829) The Court did not hold that aside from the consent the proceedings afforded a prompt remedy. The Court passed over the question of the length and cause of the delay before the proceedings were instituted, concluding that there was a "prompt remedy" because of the consent to delay the proceedings. The Court said that it was unnecessary to decide what would have been the appellant's rights "if the payment of such compensation had been unreasonably delayed." (R. 37, No. 829). If the appellant had obstructed the filing of condemnation proceedings the appellant would have been prevented by estoppel from attacking the statute and collecting interest, and whether the delay was reasonable or unreasonable because of the consent of both sides would have been immaterial. The consent simply saved the appellee from the exposure of his delay in instituting the pro-

ceedings. The holding that the appellant was not injured by the delay in a way that entitled him to attack the statute has no relation to the right to collect interest. The right to interest is tested by the duty to prevent the delay, not by the effect of the delay. If the appellant had waited until the appellee instituted the proceedings and had not brought his equity suit, clearly he would have been entitled to interest for the twenty months delay in instituting the proceedings. The fact that the appellant's equity suit was brought seasonably is no reason for denying him interest during the period in which he could have waited for the appellee to act.

2. Delay Caused by Appellee's Neglect

a. Delay in instituting condemnation proceedings

The appellant had no power to prevent the appellee from instituting condemnation proceedings. The appellant's position was that the appellee had no authority to condemn the property if by doing so he would unnecessarily destroy the operation of the mill. He did not contend that the appellee had no power to institute condemnation proceedings, and he did not resist that power. The mill question did not prevent the appellee from instituting condemnation proceedings because the mill question was still unsettled when he instituted the proceedings. The constitutional question did not prevent it because not only was that question unsettled when the proceedings were instituted by the appellee, but the institution of the proceedings actually prevented the constitutional question from being considered by the Court. The condemnation proceedings could have been instituted by the appellee notwithstanding the appellant's acts, and there are no grounds for excusing the delay in instituting proceedings (Cf. *Pelia* v. *Fowler*, 215 Iowa 90, 244 N. W. 734, 736, 737).

If the appellee had instituted proceedings before or immediately after he seized the land, there would have been no constitutional question to raise, either in the proceedings or in any suit brought by the appellant, because the constitutional validity of the statute was a question that the appellee precipitated by failing to institute the proceedings before or immediately after he seized the land. But it will no doubt be argued that even if the appellee had instituted proceedings before or immediately after he seized the land, still the appellant would have raised the mill question, and that would have caused the delay. That argument raises a fundamental question. It is not a question of fact. It is a question of applying the principle of fundamental fairness to the undisputed facts.

b. Delay caused by indifference to the mill question

If the appellee had indicated promptly that he believed it to be impossible or impracticable to keep the water flowing under the highway, that would have been a proper exercise of his discretion to which the appellant would have had to submit. If he had indicated promptly that it was practicable and that he would keep the pipes clear, that would have been sensible and would have satisfied the needs of the mill. If he had stated to the Court that it was practicable, but that he did not intend to undertake it, the Court would not have compelled the appellant to submit to that harsh decision.[118] His decision, after a delay of nearly forty-five months, to keep the pipes clear so that the appellant could operate the mill reflects the practicability of the plan. To contend that he had to wait that long to exercise an "informed" discretion or an "empirical" discretion would not only weaken his excuse in the equity suit

[118] *Southern Ry. Co.* v. *Com.*, 290 U. S. 190; cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

that the mill was not a "going concern" (R. 30, No. 829) but it would be inconsistent with his expert knowledge and ability.

The appellee made no proposal to keep the pipes clear under the highway. That he had no such intention is disclosed by his allegation in the equity suit that the mill was not a "going concern" (R. 30, No. 829), by his contention on appeal that because of his sovereign character he was not affected by the rule that the authority to condemn property devoted to a public use must be manifested either by express legislative authority or by necessary implication (R. 35, No. 829), and by his contention that the appellant's grist mill was not a public service enterprise within the rule he sought to invoke (R. 35, 36, No. 829). The appellant has no right, and does not intend, to question the decision of the Court that "the appellant's property is not devoted to a public use within the meaning of the rule which he seeks to invoke" (R. 35, No. 829). His purpose is to point out that the appellee believed and contended, and the court felt, that there was considerable authority for the view (*ibid.*) that no public service enterprise may question the appellee's authority to destroy its operations because the appellee partakes of sovereignty and the acquisition of property for state highways is one of his immediate purposes.[119] These contentions, and the delay which they caused, would have been unnecessary if the appellee had been willing to lay aside the mask of sovereignty and to display reasonable and active interest in preserving the operation of an enterprise which has been in existence since the last days of George Washington, and in his home county, and has

[119] Cf. *State Highway Com.* v. *City of Elizabeth*, 102 N. J. Eq. 221, where the "famous French monarch" was ushered in to illustrate the rigidity and finality of sovereign power. Contra: *U. S.* v. *So. Power Co.*, 31 Fed. (2) 852. See also *U. S.* v. *Gettysburg, etc.*, 160 U. S. 668; *Adirondack Ry. Co.* v. *New York State*, 176 U. S. 335.

served the public, not as a "going concern," but as Providence permitted.

Since the appellee had this grandiose conception of his sovereign capacity when he seized the land, and since he agreed many months later in the compensation hearing to preserve the water for the operation of the mill, it is not difficult to reach the conclusion that when the appellant's suggestions for protecting the mill by leaving the highway in front of the mill "were discussed, considered and rejected by the engineers as being unsatisfactory" (R. 35, No. 829) it was not because they believed that there was no practicable way by which the operation of the mill could be saved. Even though the Court thought that the appraisal of the surrounding conditions without an actual survey of the existing highway constituted a "fair appraisal" (R. 35, No. 829), it cannot be shown that the appraisal was directed to the problem of preserving the current of water under the new highway. In denying interest on the damages awarded the Court apparently did not believe that the appellee was under a special and positive duty to devise, suggest, and undertake without delay a plan for preserving the operation of the mill if he found it practicable to do so. The Court's view apparently was that in opposing the accomplishment of the sovereign's immediate purposes, the appellant acted at his peril.

c. Appellee's duty under the circumstances

The appellant contends that sovereign duties do not shrink as sovereign power expands; that high position, rigorous control, and inordinate discretion do not dispel those fundamental duties exacted of administrative officials exercising the sovereign power on lower levels; that fundamental fairness is gauged by the particular circumstances, not by the status of the administrative official in control;

and that where the duty relates to the treatment to be accorded to one who is subjected to sovereign authority the duty of a state official in constructing important highways is not less than that of the driver who segregates passengers in buses operating on the highway. Distinctions derived from administrative status do not rest on democratic principles.

Because of the Virginia segregation statute, a bus driver is a special policeman under duty to arrange passengers in their seats in accordance with the rule that Negro passengers must seat themselves from the rear and white passengers from the front. In *Davis* v. *Com.*, 182 Va. 760, the Negro passenger insisted upon retaining a seat in the front of the bus while the rear seat was occupied by white passengers. The driver told her to move, but he did not direct a white passenger on the rear seat to vacate so that the Negro could sit there. The driver assumed an attitude of sovereign indifference. He made no effort to straighten out the difficulty. Unlike the appellee, the driver was not responsible for the obstruction causing the trouble, and he had no power to remove the obstruction. That there is no statute directing the appellee to remove obstructions from mill races is immaterial. The segregation statute does not expressly require the bus driver to cause seats to be vacated to overcome objections of Negro passengers. The driver's duty is not greater because of the criminal aspect. The duty rests upon principles of fundamental fairness. In upholding the contention of the Negro passenger, the Court said: "The operator of the bus, by virtue of his employment and the duties imposed upon him by the statute, occupies a position where, in dealing with the public, a high degree of discretion and fairness is required of him. In a sense he is in a position superior to that of the passengers by reason of his right and duty to direct their seating. He should follow both the letter and the

spirit of the law in taking the lead in explaining the situation and in directing its peaceful adjustment. Not only is the duty upon him to provide a seat or space for each passenger, but he is the only one authorized to take such action and to direct its course. Until he had performed the duty placed upon him by the statute, and the plaintiff in error had refused to acquiesce therein, she was guilty of no offense" (182 Va. 760, 766). The appellee really has a stronger duty to be fair because a bus driver can not force a Negro to ride, but a mill owner must yield to the consequences of the highway construction and depend upon the appellee's fairness. Because of the appellee's power, his control, his peculiar knowledge of appropriate methods to be adopted to conduct the water under the highway to the mill, and because the appellant was brought under subjection to that power and control, the appellee was under a special and positive duty to advance the solution and to disclose his willingness to apply it for the appellant's benefit.[120]

d. Absence of Grounds for Estopping Appellant

The appellee is not in a position to contend that he acted innocently and without knowledge of the conditions affecting the operation of the mill, or that the appellant's silence worked an estoppel. The appellant's claim is not "built on an omission induced by him."[121] By demurring to the bill the appellee admitted the detailed allegations in paragraph 7 of the bill (R. 24, 25, No. 829) showing exactly how the new highway would destroy the operation of the mill.

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[120] "Diligence, integrity, and intelligent discretion in the discharge of their duties are required of public officers, particularly where the rights of the public may be jeopardized by their neglect, and their obligation to the public is not discharged by a mere perfunctory performance thereof." 46 C. J. p. 1036, sec. 305.

[121] *R. H. Stearns Co.* v. *U. S.*, 291 U. S. 54, 62.

Perhaps the appellee will argue that his knowledge was not sufficient to prime his duty to provide the solution for the mill problem, and that the appellant should have requested him more specifically to provide the solution. That was the bus driver's attitude in *Davis* v. *Com., supra.* The same argument is disclosed in the testimony of the Senior Highway Engineer, who said that the appellant was offered $2,000, but that if he had asked for $3,000 he would have received it (R. 17), the plain inference being that if the appellant had accepted $2,000 without asking for more, his failure to get $3,000 would have been his own fault (R. 17). A conclusive answer to the argument that the appellant should have made the request is that the appellant would have been in a disadvantageous position if he had made the request before the appellee instituted the condemnation proceedings. The appellant could not force the appellee to institute the proceedings to have the compensation and damages assessed because the statute authorized the appellee to postpone the institution of condemnation proceedings until sixty days after he completed the highway. It cannot be assumed that the appellee would have agreed to keep the pipes clear indefinitely without reducing the offer he made. If it be assumed that the appellee would have given the appellant $3,000, provided he had asked for it, the appellee would have reduced that amount as his price for undertaking permanently to furnish the labor for cleaning the pipes under the highway. Instead of receiving $3,000, probably the appellant would have received nothing, since that amount is not excessive to cover the expense of keeping the pipes clear over an indefinite period of years. There is nothing in the record to support the contention that pipes under highways are always kept clear anyway, and that it would not involve additional expense to the state. If that is true, clearly the appellee failed in his duty to

make that fact known before the appellant incurred the expense of conducting the equity suit.

The appellee may say that he did not propose any plan for keeping the pipes clear because the appellant wanted the new highway to be located in front of the mill instead of in the rear. He may contend that the issue as to location presented a matter solely within his discretion, and that it was not his duty to deviate from that issue since the appellant had raised it. A similar argument was rejected in *Davis* v. *Com.*, *supra*, where the Negro passenger wanted to locate in the front seat instead of in the rear. The appellant's contention that the way to allow him to run the mill without disturbance would be to keep the highway in front of the mill, not touching the race in the rear, was exactly the contention of the Negro passenger whose primary concern was to ride without disturbance. Neither the appellant nor the Negro passenger indicated that a location in the rear would not be accepted if the appellant or the driver removed the "racial" obstruction. That the appellant and the Negro passenger were invading legislative matters does not mean that arranging the highway over the race and the occupants on the rear seat were legislative matters with which the Court could not interfere. By urging that the highway be left in front of the mill, the appellant did not mislead the appellee and cause him to believe that the appellant would object to an undertaking by the appellee to keep the pipes clear under the highway in the rear of the mill. The bill in the equity suit alleged, and the appellee admitted by demurring, that when the appellant was first approached in regard to "the right-of-way for the proposed highway back of said mill," the appellant "protested and cited the injury that would be done to the mill race by the construction of the proposed highway"; that the appellant conferred with other property owners who would be affected, and joined in a petition by twenty-six out of thirty-one property owners in

seeking a hearing before the State Highway Commission "on the question of improving the existing roadbed without blighting said mill property and other properties in the neighborhood" (R. 25, No. 829); that when the appellant and the other property owners appeared before the Chief Engineer and other highway officials at Richmond they "repeated the request for a survey and plat to show what could be done to lighten up the curvature on the existing road," and that the appellant "explained to said highway officials the methods used in operating said grist mill and stated to them that the construction of the proposed road through the mill race and through the hill adjoining the mill race would materially and seriously impair if not stop altogether the operation of said mill for the reasons hereinabove stated"; that the appellant stated to the highway officials "that it would be unlawful to so impair or stop the operation of the mill by the construction of the proposed road"; and that "said officials refused to grant such request and treated lightly the contentions of the complainant in regard to the operation of said mill" (R. 26, No. 829). It was also alleged and admitted that directly thereafter the appellant and the other property owners conferred with local counsel for the appellee "and after discussing the legal questions with him, and the effect of the proposed highway on the operation of said mill, complainant again requested that a survey of the existing road be made, or that in any event the construction of the proposed road through complainant's property be postponed until the complainant could have time to prepare for a suit to enjoin said construction"; that on the next two days similar requests were made to the Senior Highway Engineer, T. W. Ross, and that the requests were refused and the refusal was followed by immediate seizure of the land (R. 27, No. 829); that an acceptable highway could be built on the existing road in front of the mill without affecting its operation, but

that the appellee's engineers refused to make a survey and plat of the existing highway to see what could be done (R. 28, No. 829). The Court concluded that the allegations did not show that the appellee acted arbitrarily in relocating the highway, but the Court did not hold that the appellee did not act arbitrarily in failing to suggest that he would undertake to keep the pipes clear under the relocated highway (R. 34, No. 829). There are no allegations in the bill to justify the contention that the appellant was primarily interested in keeping the road in front of the mill as a protection to his property as a whole, and that the mill question was only incidental, and that this was the reason the appellee did not suggest that he would keep the water flowing under the relocated highway.

The appellee may contend that the appellant's opposition and criticism prevented or excused the appellee from making any proposal for maintaining the flow of water under the highway. This contention is implied in the cross-examination of the appellant before the commissioners, as follows:

"Q. Mr. Bailey, you refused absolutely to permit the road to go through your property, and you refused absolutely to make any settlement whatever with the Highway people?

A. I did.

Q. And you did everything in the world you could to prevent them from putting the road through?

A. I did, and not only I did, but other property owners with me.

Q. And you did not try to work out any proposition with them with reference to the construction of the road or in reference to your land whatever?

A. No, sir. We protested against the construction of that highway all the way through, because we knew that it would blight all that property" (R. 26).

From this line of questioning it will be observed that the appellee's conception of fairness, and of the property owner's duty, was that while the appellee had the appellant and his property under the stringent control of the statute, which authorized the appellee to withhold the judicial process for ascertaining compensation and damages while he was trying to "work out" a "settlement" with the appellant, the latter was under a duty to make a settlement, and to try to work out a "proposition" with the appellee with reference to the construction of the road over the mill race, which obviously would have involved a reduction in the amount that the appellee offered while he had the appellant under restraint and the appellant's property under control. The appellee did not need the appellant's aid to enable him to undertake to keep the pipes clear under the highway. What he wanted was a "settlement" and the appellant's consent to a "proposition" to reduce the amount of money he would get in order to keep the mill in operation without having to submit the matter to the commissioners in the condemnation proceedings. The appellant contends that he was under no duty whatever to yield to the autocratic statutory pressure which the appellee exerted against him.

It is true that by keeping the highway off the mill race the appellant's residential property and the properties of others would not have been blighted by the new highway. That circumstance did not make it unreasonable for the appellant to try to keep the highway off the mill race so that it would not obstruct the water and prevent the operation of the mill. The question is whether the appellant was reasonable in trying to save the water power, not whether he would receive any other benefits; otherwise the right to protect a grist mill would depend upon whether the miller owned any other property adjacent to the mill. The appellee's duty to avoid delay by promptly disclosing his willingness to remove obstructions in the mill race was not less

because the appellant would have received a greater benefit to the mill if the highway had been left in front of the mill, or because the appellant desired also a different benefit from that accruing to the mill, or because the appellant opposed the highway plan of the Commonwealth of Virginia.

Because the appellant made an "assault" on state policy is no reason for the appellee to stand on the doctrine that "Those who take the sword sometimes perish by it." [122] Vigorous and determined opposition to state policy, unaccompanied by actual obstruction of state action, does not justify delay caused by the aloofness and pressure of a state official. "What is fair in one set of circumstances may be an act of tyranny in others." [123] Nothing could be more tyrannous than the arbitrary withholding of a solution by a state official while he clutches a property owner with an oppressive statutory power.

e. Sovereign Immunity Not Applicable to Just Compensation

The argument that the state is not liable for the neglect of a state official is ineffective in determining whether the state is liable for just compensation. The argument would be applicable if the appellant claimed damages for the expense incurred in conducting the equity suit through the trial and appellate courts, but the claim is for interest on the amount awarded as damages in the condemnation proceedings. Since the neglect of administrative officials prevents the sovereign from recovering interest,[124] it should also prevent the sovereign from escaping the payment of interest as a part of just compensation.

The Commonwealth of Virginia has had the use of the money. The appellee's undertaking to keep the pipes clear

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[122] Cf. *Davis* v. *Com.*, 182 Va. 760, 768 (dissenting opinion of Mr. Justice Holt).

[123] *Snyder* v. *Mass.*, 291 U. S. 97, 117.

[124] *Jackson County* v. *U. S.*, 308 U. S. 343.

resulted in a direct benefit to the Commonwealth in that the claim for damages for injuries to the operation of the mill was withdrawn so that the commissioners did not consider the question of injury to the mill as an element in determining damages to be recovered for injury to the residue of the appellant's property (R. 19, 20). To allow the Commonwealth to retain this benefit and to escape payment of interest covering the delay caused by the appellee's neglect to offer his undertaking at the proper time would be conferring a double benefit. It is unjust to allow the Commonwealth to profit by the appellee's undertaking and also to profit by his failure to undertake at the proper time. By allowing the Commonwealth this unjust enrichment, the ruling of the Court was gross and obvious. The appellant contends that the equitable position of the Commonwealth is analogous to that of the cestui in *Stone* v. *White*, 301 U. S. 532; and that the principle of that decision is sufficient ground for requiring the Commonwealth to pay interest in order to prevent a double benefit.

D. Admission of Delay in Instituting Condemnation Proceedings

The appellee has admitted that the delay of one year and eight months beginning with the excavations started on October 16, 1941, and ending on June 17, 1943, when condemnation proceedings were instituted, was caused by him (R. 6, 7). A positive admission was made by the Attorney General in the statement upon which the Court in the equity suit relied in denying the appellant the right to attack the statute (R. 36, No. 829). He said: "At the instance of the landowner, the appellant in this case, action in the condemnation proceedings has been held up by the lower court pending a decision in this case * * * it is to be noted that the postponement of the actual acquisition of title to

the land is no longer due to the action of the State Highway Commissioner, but to the action of the appellant." [125]

In the appellee's motion to strike, filed in the condemnation proceedings (R. 9), he stated that "a substantial part" of the delay was caused by the appellant "in insisting that the condemnation proceedings be delayed until the termination of the injunction suit," thus admitting by implication that the delay prior to the institution of the proceedings was caused by the appellee.

E. Delay by Consent Pending Appeal in Equity Suit

The appellee agreed to the delay from the time he instituted the proceedings until March, 1944, a period of nine months.[126] The agreement is evidenced by the Court's statement that "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right of the State Highway Commissioner to condemn the property in question" (R. 36, 37, No. 829). There was no agreement or implied understanding that interest would not be paid or that whether interest would be paid depended upon the outcome of the appeal in the equity suit.[127] If the appellant had forced the appellee to wait until the appeal was completed, as the appellee forced the appellant to wait until the condemnation proceedings were filed, the appellant would not be entitled to interest for the nine months fol-

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[125] The Attorney General's statement is shown in the Appendix to the Brief in support of the Petition for Certiorari, No. 829, p. 68. "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced." *Best* v. *Dist. of Columbia*, 291 U. S. 411, 415.

[126] In March, 1944, the appellee moved to have commissioners appointed in the condemnation proceedings while the appellant sought a review by this Court of the decision in the equity suit (R. 3, 4).

[127] The Court does not "presume acquiescence in the loss of fundamental rights." *Ohio Bell T. Co.* v. *P. U. C. of Ohio*, 301 U. S. 292, 307.

lowing the institution of proceedings. The appellee was not forced to consent. He elected to wait and to withhold and use the money in the meantime. Obviously his purpose in consenting to wait was to build up the argument that he had instituted the proceedings but that he was unable to proceed any further because the Court below, "at the instance of the landowner, the appellant in this case," had held up the proceedings pending the appeal in the equity suit, and that for this reason the appellant was not entitled to attack the statute. There is nothing in the record to support the view that it was because of the appellant's "insistence" that the Court held up the condemnation proceedings, or that the appellee did not consent to the delay. The Court stated that the delay was by "consent of both sides" (R. 36, No. 829). Under these circumstances, there was no ground for denying interest.[128] The denial was gross and obvious.

F. Period in Which Condemnation Proceedings Were Active

There is not the remotest reason for denying interest during the period of approximately four months in which the condemnation proceedings were carried on, that is, from April 22, 1944, when the appellant's plea was filed (R. 4), until August 11, 1944, the date of the final decree (R. 33). This period of time was required for the pleadings, argument, hearing, and the preparation and entry of the decree in the condemnation proceedings, and it has never been contended by the appellee that the appellant was responsible for that delay or that the appellant should not have interest for that period of time. The denial of interest for this period reflects an incredible disregard of the plain

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[128] *Drury* v. *Midland R. Co.*, 127 Mass. 531; *Bloom, S. & G.* v. *Mitchell*, 289 Mass. 376; *Borst* v. *Young*, 302 Mass. 124; *Phila., etc. R. Co.* v. *Gesner*, 20 Pa. 240; *Sel., etc. R. Co.* v. *Burson*, 61 Pa. 369.

rights of a property owner to be free to file his pleading in condemnation proceedings after his property has been mutilated, and to have his compensation claims adjudicated without being penalized. The denial was arbitrary.

G. Payment of Interest, Notwithstanding Deposits

The deposit made by the appellee under the statute assailed (R. 27, No. 829) was not effective to stop interest on the amount deposited, if the statute is held to be unconstitutional;[129] and the deposit made on August 19, 1944, pursuant to the order of the Court, was not effective to stop interest if in this appeal the appellant is successful.[130]

IV. Conclusion

Invalidity of Statute, and Compensation for Use

Under the due process clause of the Fourteenth Amendment, the invalidity of the statute assailed derives from the procedural control which enabled the appellee to have the compensation and damages determined by an unfair view of the appellant's property. Since the statute was invalid from the beginning, the use of the property for highway purposes was unauthorized, and since the use was accomplished in the face of warnings of invalidity, and in conscious disregard of the appellant's constitutional rights, with resulting benefit to the state, the appellant is entitled to compensation for the rental value of the property for highway purposes. The denial of compensation on that basis operated to deprive him of his property without due process of law contrary to the Fourteenth Amendment, but

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[129] *Norton* v. *Shelby County*, *supra*.

[130] *Schnull* v. *Indianapolis U. R. Co.*, 190 Ind. 572.

aside from that he is entitled to compensation on that basis under the Virginia decisions if the statute is void ab initio.

Interest

The denial of interest was in violation of the due process clause of the Fourteenth Amendment because interest on the damages awarded is a part of just compensation, and the denial was gross and obvious. The delay in payment was caused by the appellee, and the appellant had no power to prevent the delay. The statute assailed furnished the opportunity to delay payment. The delay is divided into four parts, (1) the period of twenty months prior to instituting condemnation proceedings (R. 7); (2) the period of approximately nine months pending the appeal in the appellant's equity suit, and before the appellee applied for the appointment of commissioners in the condemnation proceedings (R. 1, 3); (3) the period of approximately four months while the condemnation proceedings were active (R. 4-37); and (4) the period from the final decree in the condemnation proceedings (R. 33) until payment is received.

If it had not been for the statute, the appellant could have compelled the appellee to institute condemnation proceedings immediately, and in that case the appellant would have been in a position to negotiate with the appellee on an equal basis. As it was, the appellee had the advantage since under the statute he controlled the time for instituting proceedings to determine the damages. If the appellant had offered to waive damage to the mill in consideration of the appellee's undertaking to preserve the water power that would not have caused the appellee to institute the proceedings any sooner since the appellee contended that he was waiting for the highway to be completed before in-

stituting the proceedings, as shown by the Court's statement that "the highway has been completed and condemnation proceedings to acquire title to the appellant's property have been instituted." (182 Va. 70, 75; R. 36, No. 829.) To obtain a settlement of the mill question before the condemnation proceedings were instituted, the appellant would have had to accept a reduction in the amount which the appellee offered. If the control established by the statute is a sufficient reason for invalidating the statute, it is a sufficient reason also for rejecting the contention that the appellant was responsible for the delay in instituting the condemnation proceedings. The delay of twenty months before the condemnation proceedings were instituted by the appellee would have been avoided if the appellee, instead of relying upon his statutory control and sovereign status, had promptly instituted condemnation proceedings and had promptly offered to preserve the water power. The appellant's equity suit did not prevent the appellee from instituting condemnation proceedings promptly, and it did not prevent him from undertaking promptly to preserve the water power. The only reason the appellee can advance for not instituting condemnation proceedings promptly is that he waited until he completed the highway, but that is no reason for denying interest. The only reason he can advance for not undertaking promptly to preserve the water power is that his sovereign position is on the highest level, where subordinate duties are excluded, which is a perversion of the doctrine of sovereign immunity, as well as an insufficient reason for denying interest.

The appellant was in a position to negotiate freely when the appellee instituted the condemnation proceedings, but at that time the appeal in the appellant's equity suit had been pending for several months (R. 21, 31, 32, No. 829). By consent of both sides, the condemnation proceedings

were delayed for approximately nine months to await the decision on the appeal in the equity suit (182 Va. 70, 75; R. 36, No. 829) on questions that never would have been litigated had the appellee instituted condemnation proceedings promptly and had he undertaken promptly to preserve the water power. Interest was not waived by the consent. That the appeal in the equity suit terminated in the appellee's favor is no reason for denying interest, because the consent to delay did not include an agreement that interest would not be paid if the equity suit terminated in the appellee's favor. If the condemnation proceedings had been delayed by Court order over the appellee's objection the delay for nine months would be chargeable to the appellant. The appellee, as well as the state, received a benefit from instituting condemnation proceedings, and then consenting to delay the proceedings, because his strategy enabled him to obtain a decision by which the constitutional question was avoided in the equity suit (182 Va. 70, 75, 76; R. 36, 37, No. 829).

When the time came for the commissioners to assess the damages the appellant was then in a position to bargain with the appellee without being harassed by his statutory control. The appellee became flexible in his attitude, and agreed to preserve the water power in consideration of the appelant's withholding from the commissioners the question of damage to the mill (R. 19, 20). The state has had the use of the money, and has received a benefit from the appellee's belated undertaking to preserve the water power because the mill question was not submitted to the commissioners. It should not be allowed to accept the benefit and to escape the payment of interest on the money it has used.

The appellant is entitled to interest also for the period of approximately four months during which the condemna-

tion proceedings were active, and also for the period from the final decree in the condemnation proceedings until payment is received. The deposit made when the property was seized is ineffective to stop interest because it was based upon the statute assailed. The deposit made after the final decree (R. 37) is ineffective to stop interest if the appellant is successful in this appeal.

Respectfully submitted,

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Pro se.